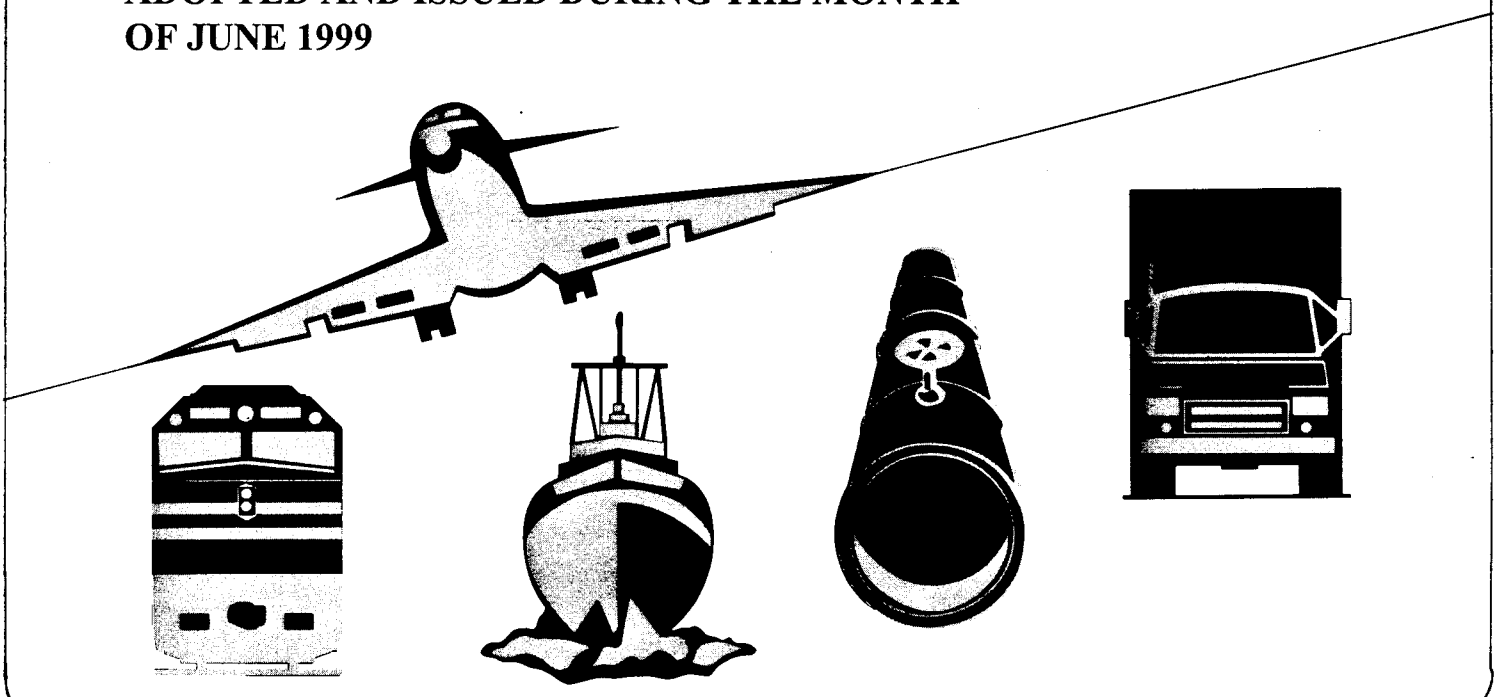
PB99-916706
NTSB/IDBOO-99/06

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C. 20594

TRANSPORTATION INITIAL DECISIONS AND ORDERS AND BOARD OPINIONS AND ORDERS

ADOPTED AND ISSUED DURING THE MONTH OF JUNE 1999



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16.Abstract **This publication contains all Judges Initial Decisions and Board Opinions and Orders in Safety and Seaman Enforcement Cases for June 1999.**

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OPINIONS AND ORDERS

FOR THE MONTH OF JUNE 1999

SERVED: July 1, 1999

NTSB Order No. EA-4778

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. TIMOTHY J. DOREEN, Jr. Respondent.	Docket SE-15198

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing held on October 1, 1998.[1] The law judge affirmed two orders (complaints) issued by the Administrator alleging that respondent, as first officer and flying pilot, and Anthony Lessel, as pilot-in-command (PIC) and

[1]The initial decision is attached. Respondent has filed a brief on appeal and the Administrator has filed a reply.

(5)

the non-flying pilot on a Part 121 flight, deviated from an air traffic control (ATC) instruction, in violation of section 91.123(b) of the Federal Aviation Regulations (FARs), 14 C.F.R. Part 91.[2] The Administrator did not seek any suspension time. As discussed below, we deny the appeal.

Respondent admitted to all the paragraphs in the complaint and states on appeal that he agrees with the characterization of the facts as summarized by the law judge. In short, on June 22, 1997, respondent was the first officer of TWA Flight 160 from Albuquerque to St. Louis and operated the aircraft on that leg of the flight. Captain Lessel was the non-flying pilot and worked the radios. In preparation for approach, ATC instructed TWA Flight 160 to descend and maintain 7,000 feet altitude and, as the law judge found, Captain Lessel acknowledged the instruction, but then entered 5,000 rather than 7,000 feet into the altitude alerter.[3] The aircraft had descended to 6,400 feet when ATC

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[2]Respondent Lessel also appealed the law judge's decision but later withdrew his appeal.

Section 91.123 states, in pertinent part:

§ 91.123 Compliance with ATC clearances and instructions.

* * * * *

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

[3]Captain Lessel claimed that he did not hear the clearance because he was communicating with the company at the time, and that it was respondent who had the radios when the clearance was issued, acknowledged the clearance, and entered the wrong altitude into the altitude alerter. Respondent stated that he did not remember hearing or acknowledging the clearance, or entering the altitude. The law judge found that it was Captain Lessel who acknowledged the clearance and dialed in the wrong

asked to what altitude they were going.

By admitting to the factual allegations in the complaint, respondent then assumed the burden of proving the affirmative defense of reasonable reliance on the non-flying pilot's proper performance of his responsibilities. See Administrator v. Morrison, NTSB Order No. EA-4119 at 2-3 (1994). He claims that he was busy with his "primary responsibility, flying the airplane," and was entitled to rely on the non-flying pilot to perform his own duties. Thus, respondent asserts, the law judge erred in not accepting this as a defense.

We cannot agree with respondent's argument. Part of his responsibility to "fly the airplane" is his responsibility to adhere to the procedures in the applicable flight handbook. In this instance, the TWA MD-80 flight handbook states that "[a]fter receipt and confirmation of any ATC clearance, the pilot flying will repeat aloud his understanding of the clearance to assure that the pilot not flying is aware of the altitude and clearance limit to which the flight is cleared." (Exhibit R-1.) No evidence was introduced to indicate that respondent repeated the clearance aloud.[4]

The reasonable reliance defense, as discussed in Administrator v. Fay & Takacs, NTSB Order No. EA-3501 at 9

(..continued)
altitude. (Transcript (Tr.) at 113-14.)

[4]Captain Lessel testified that it was not done. (Tr. at 57.) As for respondent, it was revealed through his testimony that he remembers very little about the flight.

(1992), is not available to respondent given the facts of this case. He had an independent obligation, as illustrated by the TWA MD-80 flight manual, to repeat the clearance, and he had the ability to ascertain the correct clearance, by listening and repeating that clearance.[5] See also Morrison, supra.

We have been presented with no reason to overturn the decision of the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The initial decision of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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[5]Administrator v. Nutsch, NTSB Order No. EA-4148 (1994), aff'd, 55 F.3d 684 (D.C. Cir. 1995), cited by respondent, is not helpful here. In that case, Mr. Nutsch (the non-flying pilot) admitted he heard the clearance and had the responsibility to enter it into the autopilot altitude selector but that, nevertheless, his copilot undertook the task and evidently entered the wrong altitude into the selector. We found that he "did not satisfy the duties of a reasonable and prudent pilot when he assumed that the copilot would correctly enter the cleared altitude." Id. at 6.

Respondent's argument that he had been "busy flying the airplane" and should not be expected to listen for the altitude clearance is not supported by Nutsch, where we specifically "declin[ed] to find that other duties 'were so extensive or more significant that such a fundamental matter as altitude clearance might be justifiably ignored, especially during ascent and descent.'" Id. at 5-6, citing Administrator v. Frederick and Ferkin, NTSB Order EA-3600 (1992), at 6-7.

Respondent's citation of Administrator v. Boynton, SE-9371, a non-precedential case, is also unpersuasive.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR Federal Aviation Administration, Complainant, v. TIMOTHY F. DOREEN, JR., Respondent, and ADMINISTRATOR Federal Aviation Administration, Complainant, v. ANTHONY LESSEL, Respondent.	Docket Number SE-15198 Docket Number SE-15210

U.S. Tax Court
1114 Market Street
St. Louis, Missouri

Thursday,
October 1, 1998

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE WILLIAM R. MULLINS
Administrative Law Judge

(9)

APPEARANCES:

On behalf of the Complainant:

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On behalf of Respondent Lessel:

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Also Present:

JOHN A. MARSHALL, JR.
Aviation Safety Inspector
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St. Ann, Missouri 63074

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR Federal Aviation Administration, Complainant, v. TIMOTHY F. DOREEN, JR., Respondent, and ADMINISTRATOR Federal Aviation Administration, Complainant, v. ANTHONY LESSEL, Respondent.	Docket Number SE-15198 Docket Number SE-15210

ORAL INITIAL DECISION AND ORDER

BY JUDGE WILLIAM R. MULLINS:

This has been a proceeding before the National Transportation Safety Board held under the provisions of Section 44709 of the Federal Aviation Act of 1958, as amended, on the appeal of two Respondents in this case, Mr. Timothy F. Doreen, Jr., and the Board Docket Number of Mr. Doreen's case is SE-15198, and the second Respondent who has appealed is Anthony Lessel, and his Board Docket Number is SE-15210, and each of

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those Respondents has appealed from an Order of Suspension filed by the Administrator, Federal Aviation Administration, through regional counsel of the Central Region in Kansas City.

The Order of Suspension serves as the complaint in our proceedings, and -- and as I said, was filed on behalf of the people in Kansas City.

The matter has been heard before me, William R. Mullins. I'm an administrative law judge for the National Transportation Safety Board, and as provided by the Board's rules, I will issue a decision today.

The matter came on for hearing here in St. Louis, and the Administrator was represented by counsel, Mr. John Escott, Esquire, of the Central Region. Respondent Doreen was present at all times and represented by counsel Mr. David Holtzman, Esquire, of the St. Louis area, and Mr. Lessel appeared in person and was present at all times and was represented by Mr. Jim Waldon and Mr. William G. Anderson, both attorneys here in the St. Louis area, and if I have this correct, Mr. Waldon, Mr. Anderson are attorneys with TWA, --

MR. WALDON: Yes, Your Honor.

JUDGE MULLINS: -- and Mr. Holtzman is an attorney with ALPA, Airline Pilots Association.

MR. HOLTZMAN: Yes, sir.

JUDGE MULLINS: Okay. The parties were afforded a full opportunity to offer evidence, to call, examine and cross examine witnesses. In addition, the parties were afforded an opportunity to make argument in support of their respective positions.

Discussion

The Order -- Orders of Suspension issued in both of these cases did not seek suspension, simply a violation of FAR 91.123(b), and the Order of Suspension in each case are identical. Paragraph 1 states that the pilot was a holder of an airman's certificate with air transport pilot privileges.

Paragraph 2 states that on or about June 22nd, 1997, you acted as a captain or -- or first officer, depending on which of these individuals it pertained to, on Trans World Airline Flight Number 160, a Douglas Model DC-982, being operated under instrument flight rules, pursuant to TWA's air carrier certificate and Part 121 of the Federal Aviation Regulations, on a flight from Albuquerque, New Mexico, to St. Louis, Missouri.

Paragraph 3 states that on the occasion referred to above while maneuvering for an approach into St. Louis, Air Traffic Control instructed TWA Flight 160 to descend and maintain 7,000 feet altitude,

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and you acknowledged that.

Paragraph 4 states that without receiving an amended clearance or instruction, TWA Flight 160 descended to 6,400 feet altitude in an area in which Air Traffic Control was exercised, and Paragraph 5 states that on the occasion referred to above, no emergency existed or was declared.

At the outset of the hearing, both Respondents stipulated to all of those facts in the Administrator's Order of Suspension, and, so, this case proceeded, the burden having shifted to the Respondents to show what evidence they might have to indicate that -- that they should not be found in regulatory violation as alleged.

The facts were undisputed that First Officer Doreen was the flying pilot during this leg, and that Captain Lessel was operating the radios, and at some point in the St. Louis area, Air Traffic Control, and it's clear on the transcript, which is Exhibit A-1, advised the flight to descend from Flight Level 150 down to 7,000 feet, and it was acknowledged, and I've listened to the tape, and it was acknowledged on the tape, whoever received that, and that was the contention in this case, but whoever received it dialed in the flight order altitude alert device that's on the

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control panel, 5,000 feet, and the aircraft started down to 5,000 feet, hence the violation.

It is First Officer Doreen's contention in this case that he relied, I guess, on the captain who received the transmission, and that when he looked up, the 5,000 feet was in the -- in the alert mode, altitude alerter, and that it said 5,000 feet, and he relied on that, and that's the reason for -- that he should not be found in violation as alleged.

I -- the cases that I hear all revolve around this altitude alert thing, and it makes me almost think that if I was a 121 pilot, I wouldn't even want one of those things on there, and there have been some cases, and I assume that TWA folks wouldn't even know this because I understand that you don't operate 737s, but there's been several cases where the 737 aircraft, the altitude alerter has on its own changed the numbers after the correct number was dialed in, and the pilots have focused on that thing, and they've descended to an altitude, and in those cases, the Board has found that that's tough, that's the reason, you know, the pilots get paid the big bucks to be up front there and monitor that stuff, and if that machine changes on you, it's still pilot error.

I guess the bottom line for me, though, and

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cutting right to the chase for First Officer Doreen is that under any interpretation of this evidence today, you would be in regulatory violation. You have an obligation as the flying pilot, and the cases are pretty clear as the flying pilot, even if there are some distractions, and there apparently weren't any that day for you, you still have an obligation to monitor as the flying pilot the altitude, to make sure that you listen and make sure that the other guy is putting in the numbers correctly or if it was your -- if you received it, then you had that obligation, and -- and like I said, under any interpretation of these evidence -- this evidence today, you would be in regulatory violation, and I will so find as to Mr. Doreen.

Turning now to Captain Lessel, I -- I -- I find several things interesting here, and I'll highlight those, and I don't -- they relate, I guess, at least for my interpretation, to Captain Lessel's credibility, but Captain Lessel testified that he thought it was sort of arrogant on the part of the first officer not to apologize for this mistake, but I can't find anything more arrogant than to know within hours of a flight that there was a problem and even filing a NASA report within the allotted 10-day time

period and not sharing that information with your crew -- fellow crew member.

I don't know about TWA. I know the airlines that I'm familiar with, all the pilots are on an e-mail system, and they all know their e-mail addresses, and they can get into those things and communicate that way, but notwithstanding whether TWA has that or not, I can't believe that in this instance, that this captain of that flight, who knew about the problem, he says he knew about it when it happened, but certainly he knew about it within two hours after the flight was over, did not communicate or at least talk to the first officer about what happened.

At the same time, I have testimony here under oath that the company encouraged the captain to file a NASA report, and the company didn't even communicate that to the other crew member, and if I were the first officer, I would be really disgusted about that, and if I were an ALPA member, I would be ringing all kind of bells over at ALPA, saying why don't you put this on your little letter or whatever kind of communication you have with the rest of the pilots unions, and -- and I'm not talking about just absolving one another from a regulatory violation.

But if you really believe in crew resource

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cockpit coordination, I mean when you have a problem, then the crew needs to coordinate to make sure that that problem doesn't happen again (1), and (2) you need to communicate to the rest of the pilots, not just the captains, to make sure that that sort of a problem doesn't come up again. So, I have some real problems with that.

Another problem I have with Captain Lessel's testimony is that he called Air Traffic Control and told them he had an ATIS when he didn't. I mean that's got to be a violation in and of itself, although I've never seen that violation, but if you have somebody come in and said, well, I called and told them I had Alpha, but I was -- I didn't have it, I was going to get it later, you know, that's a real problem, and, of course, that -- that also contributes to his version of what happened out there, if you want to adopt those facts.

His testimony was he was talking to the company, but the transcript reflects that the call to the company didn't come until two minutes after this call was made about the altitude reduction or the instruction to the descend from 15,000 to 7,000 feet.

Captain -- First Officer Doreen testified under oath that he listened to the tape, and he

believed that it was Captain Lessel. Captain Lessel had not listened to the tape at the time he testified, and -- and the explanation was that the tape they had was garbled, but I -- I'm satisfied with the Administrator's explanation that it's a two-track tape, and you have to have the -- a recorder that will track those two, but in any event, Captain Lessel hadn't heard the tape, and then I heard the tape, and I'm satisfied that that was the same voice all the way through there, and based on listening of the tape and the first officer's testimony, I find also that the captain was involved in this altitude deviation, and that therefore he's in regulatory violation.

For the record, I would state that I -- I have listened to Administrator's argument about the new first officer, and I -- I think that that falls on deaf ears. I mean if -- if the FAA lets that guy get in the right seat of a 121 operation, he should be held to the same standards, and the captain should expect him to be held to the same standards as all the other pilots, and that we can't be expecting captains to be molly-coddling all these guys that have less than 200 hours or less than a hundred hours or less than whatever the magic number is.

But in any event, I do believe under these

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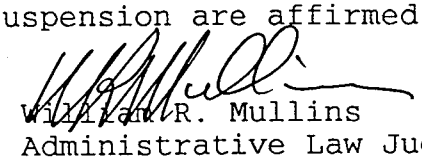
facts, that it was Captain Lessel who made the call, and since he made the call, he would have been the one that dialed in the wrong altitude, but in any event, I'm finding both of these Respondents in regulatory violation as alleged, and as stated at the outset, the Administrator is seeking no actual suspension. So, that will be the Order.

Order

IT'S THEREFORE ORDERED that safety in air commerce and safety in air transportation requires an affirmation of the Administrator's Orders of Suspension as issued, and specifically I find that a preponderance of the evidence in these two cases show regulatory violation as alleged on the part of each Respondent, and therefore the Orders of Suspension are affirmed.



William R. Mullins
Administrative Law Judge

JUDGE MULLINS: Gentlemen, each of you has a right to appeal this order today, and you may do so by filing your Notice of Appeal with the National Transportation Safety Board. You need to file your Notice of Appeal within 10 days of this date, and then within 50 days after filing your Notice of Appeal, you need to file a brief in support.

Your Notice of Appeal goes to the Office of Administrative Law Judges, NTSB, in Washington, D.C., and that address is contained on the sheet that I'm getting ready to hand to the parties.

The brief within 50 days goes to the Office of General Counsel of the National Transportation Safety Board at a different room but the same street address in Washington, D.C., and that address is also on here, and since there is no suspension that's involved, there's no other requirement, other than if you wish to appeal, you need to do something within 10 days.

I would ask Mr. Holtzman and Mr. Waldon, if you'll come up, and I'll hand you copies of your clients' written rights to appeal, and it's got the addresses and so forth, and I'd like the record to reflect that I've handed each one of those gentlemen, and the Administrator, if you need to respond, I'm sure

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you have those addresses.

All right. Is there any question about the Order? First, from the -- Mr. Holtzman?

MR. HOLTZMAN: No.

JUDGE MULLINS: Mr. Waldon, any question about the Order?

MR. WALDON: No, Your Honor.

JUDGE MULLINS: Okay. Then thank you, gentlemen. The hearing's terminated.

(Whereupon, at 12:30 p.m., the hearing was concluded.)

SERVED: July 1, 1999

NTSB Order No. EA-4779

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. JOHN RICHARD DUNN, Respondent.	Docket SE-15606

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on June 2, 1999, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's mechanic certificate (No. 548061807), with airframe and powerplant ratings, for his alleged violation of section 43.12(a)(1) of the

[1]An excerpt from the hearing transcript containing the initial decision is attached.

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Federal Aviation Regulations, "FAR," 14 C.F.R. Part 43.[2] For the reasons discussed below, the appeal will be denied.[3]

The Administrator's Emergency Order of Revocation, dated April 20, 1999, alleges, in part, the following facts and circumstances concerning the respondent:

> 2. On or about March 11, 1998, you performed maintenance on civil aircraft N515LG, an Israel Aircraft Industries IA-1124, and approved said aircraft for return to service.
>
> 3. You made the following entry in the maintenance records of N515LG: "c/w 3 yr T/R cable lube."
>
> 4. At the time you made the entries referred to in paragraph 3, the aircraft maintenance manual required the lubrication of the throttle retarder feedback cable at intervals not to exceed three years.
>
> 5. Your entry in the aircraft maintenance records, as described in paragraph 3, signified that you had performed the required lubrication of the throttle retarder feedback cable.
>
> 6. That entry was fraudulent or intentionally false in that you did not lubricate the throttle retarder feedback cable.

On appeal, respondent contends that the charge against the respondent was not supported by a preponderance of the substantial, reliable, and probative evidence. We find no error in the law judge's contrary conclusion.

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[2]FAR section 43.12(a)(1) provides as follows:

> § 43.12 **Maintenance records: Falsification, reproduction, or alteration.**
>
> (a) No person may make or cause to be made:
> (1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part....

[3]The Administrator has filed a reply brief opposing the appeal.

We need not review in detail the evidence introduced in support of the Administrator's single charge against the respondent, as it is adequately described in the law judge's decision. He did not credit respondent's testimony that he had performed the lubrication service noted in the aircraft's maintenance logbooks, in the face of persuasive evidence that the respondent could not have done so. The chief components of that evidence are these: (1) the throttle retarder feedback cable cannot be lubricated unless two access panels (on the nacelle of each of the aircraft's two engines) are removed; (2) the entire aircraft was painted in 1996; (3) examination of the access panels in February 1999, almost a year after respondent's logbook entry, revealed that the paint around the panels and over the screw heads securing them had not been broken or disturbed; and (4) there was no visual indication, nor logbook entry to support any conclusion, that the seams around the panels or on the screws had been repainted after a removal for maintenance. We agree with the law judge that this showing constituted sufficient circumstantial proof that respondent, contrary to his logbook entry, could not have accomplished the maintenance he signed off, and, therefore, that the violation was established.

Respondent's contentions to the effect that his testimony should have been accepted over those who testified on behalf of the Administrator amount to no more than a challenge to the law judge's credibility assessments.[4] Respondent has not, however,

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[4]The law judge was fully apprised of all the factors that

identified any compelling basis for concluding that the law judge's credibility determinations were arbitrary, capricious or otherwise deficient in a manner which would warrant their reversal on appeal. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and

2. The initial decision and the Emergency Order of Revocation are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(..continued)
may have influenced the testimony of the various witnesses, including the fact that one of them worked for a company whose predecessor, sometime after respondent's maintenance on N515LG, performed a check on the aircraft during which the throttle retarder cable should have been, but was not, they voluntarily admitted, serviced.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY, Administrator
Federal Aviation Administration,

Complainant

v.

JOHN RICHARD DUNN,

Respondent

Docket No. SE-15606

NTSB Courtroom
624 Six Flags Drive, Suite 150
Arlington, Texas

Wednesday,
June 2, 1999

The above-entitled matter came on for hearing, pursuant to Notice, at 9:50 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

For the Complainant:

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(817 625-5581

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ORAL INITIAL DECISION AND ORDER

JUDGE MULLINS: We'll go on the record at this time.

This has been a proceeding before the National Transportation Safety Board and the matter has come on for hearing on the appeal of John Richard Dunn from an Emergency Order of Revocation that has revoked his airframe and powerplant certificate or mechanic's certificate with those ratings.

The Order of Revocation serves as a complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through regional counsel of the Northwest Mountain Region in Renton, Washington.

The matter has been heard before me, William R. Mullins. I'm an Administrative Law Judge, and as is required by the Board's rules in emergency cases, I will issue a decision here today.

The matter came on for hearing pursuant to notice to the parties here in Arlington, Texas, this 2nd day of June of 1999.

The Administrator was represented throughout this proceeding by Mr. John Callahan, Esquire, of the Regional Counsel's Office of the Northwest Mountain Region, Renton, Washington; and the Respondent was present

at all times and was represented by Mr. Jim Lane, Esquire, of Fort Worth.

The parties were afforded a full opportunity to offer evidence, to call, examine and cross examine witnesses. In addition, the parties were granted an opportunity to make argument in support of their respective positions.

DISCUSSION

JUDGE MULLINS: As I stated previously, the matter was on for hearing on an Emergency Order of Revocation that has revoked Mr. Dunn's A&P certificate.

The Emergency Order of Revocation alleges a regulatory violation of FAR 43.12(a)(1). The principal portion of the Emergency Order of Revocation has six paragraphs. The first five were admitted by the Respondent.

And those paragraphs are: Paragraph 1, "At all times material hereto you were and are the holder of mechanic's certificate number 548061807, with airframe and powerplant ratings." That was admitted.

Paragraph 2, "On or about March 11th, 1998, you performed maintenance on civil aircraft November 515LG, an Israel Aircraft Industries IA-1124, and approved said aircraft for return to service." That was admitted.

Paragraph 3, "You made the following entry in

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the maintenance records of November 515LG, '(C/W 3-year T/R cable lube.'" And that was admitted.

Paragraph 4, "At the time you made the entries referred to in Paragraph 3 the aircraft maintenance manual required the lubrication of the throttle retarder feedback cable at intervals not to exceed three years." That was admitted.

Paragraph 5, "Your entry in the aircraft maintenance records as described in paragraph 3 signifies that you had performed the required lubrication of the throttle retarder feedback cable." That was admitted.

Paragraph 6, "The entry was fraudulent or intentionally false in that you did not lubricate the throttle retarder feedback cable," and that has been denied.

And as a result of those allegations, the Administrator has alleged the regulatory violation of FAR 43.12(a)(1) and has revoked the certificate.

The Administrator had eight exhibits. I don't need to go through all of the exhibits because the logbook entry was admitted.

Much of the evidence was admitted, as I've just indicated. However, the primary focus of the Administrator's case here is that the access panels, which was undisputed must be removed to perform the maintenance

described in the logbook entry, had not been removed.

The allegation was that the maintenance was performed in 1998. The aircraft was painted in 1996. The photographs, which would indicate and show those access panels, and specifically the one panel which is the second photograph in Exhibit C-4 and the second photograph in C-4(a), which are copies of those photographs, shows that not only does it appear that the access door had not been removed since there had been paint, but it also reflects that there were three different colors of paint, because one of the letters in the tail number of the aircraft extended down through that access panel.

The Administrator called three witnesses. The first was Mr. Brown, who is the chief pilot of Label Graphics, the company that owns the aircraft, and he had been the chief pilot some time prior to any of this contact with the Respondent.

And Mr. Brown testified that the aircraft had been painted prior to bringing the aircraft down to Fort Worth to have the work done by Mr. Dunn, and he also testified that no one else had been authorized to paint nor had they ever been charged for any painting that was done since that time.

The second witness called by the Administrator was Mr. Karren. Mr. Karren works for Aero Air, Inc., that

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was in existence up to approximately sometime early last year, and then they were replaced by Aero Air, L.L.C., and they're located in the Portland area, and they are apparently the certificated repair station that does most of the work on this particular aircraft.

But Mr. Karren testified that when they were doing some work in February, they discovered these access panels had not been removed and he contacted Mr. Baas, who is the principal maintenance inspector for that certificated repair station, and Mr. Baas was the third witness called by the Administrator.

Mr. Karren admitted on cross examination that they had performed, his company, Aero Air or Aero Air, Inc., I guess it was Aero Air, Inc., had performed an A check sometime last year, which required the removal of those panels and that work was done subsequent to the time alleged that Mr. Dunn, the Respondent, did his work, but that the access panels were not removed during the A check.

It was determined from his testimony and the testimony of others that there was no certificate action going on against Mr. Karren or Aero Air, Incorporated, because Aero Air, Incorporated, evaporated and became Aero Air, L.L.C.

So that the repair station, as was indicated by

the Administrator, that existed at the time this A check was done when those doors should have been removed no longer exists.

Mr. Baas was called to testify. He's an aviation safety inspector and he testified that he was the principal maintenance inspector for Aero Air, Inc. for 12 years and now has been the principal maintenance inspector for Aero Air, L.L.C. for the last year since they've been in existence.

He said that he was called by Mr. Karren. He went out the day afterwards. He was told that all four of the access doors, and there's two on each engine, had been painted and had not been removed since the date of the painting.

But when he arrived the next day, there was only one door that remained intact, but that was the door on the left engine, which is reflected in the second photo of C-4 and the second photo of C-4(a).

His testimony was that it had not been touched up, that this was an original paint scheme; and particularly with the letters down the way they were, that there was no way that there could have been a touchup.

He said it would have been extremely difficult and he didn't believe there was a touchup. Mr. Karren testified he had some experience and time working on

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aircraft; that he didn't believe it had been touched up.

Mr. Dunn then was called. Mr. Dunn said that he had been in the aviation business for twenty-two-and-a-half years. He company, Trimec, that he owns with a couple of other people, specializes in Westwind aircraft, which this one was.

And he testified that he did not touch up these panels, but that he did remove them and that he had done the work.

There are several exhibits and I don't think it's necessary to go through all of the exhibits. Respondent's Counsel has raised the issue about the credibility of Mr. Karren and Mr. Baas because of this work that they were supposed to have done and that they not only now admit they didn't do it but there has not been any action taken against those folks.

In that regard, I would simply say this. All of the repair stations that I have had hearings against, that I have seen and have had problems with, and you can take this for whatever it's worth, Mr. Baas, but any time a principal maintenance inspector has been hanging around for more than five years, there's usually some problems start coming up.

And when that guy goes on his way and the next guy comes in, there's usually all kind of, if you'll

pardon the expression, hell to pay that often results. I don't know that that's the situation you've got up there, but I know that that's what it looks like to this Respondent, because you've come in and you've asked to put him out of business and your folks that you've been dealing with for 13 years are skating on a logbook entry that looks just as bad as the one that Mr. Dunn made.

You can call it what you like, but if they said the access doors were removed and they did an inspection and they weren't, then they are just as guilty, and I don't care how you change the name of the corporation and the kind of little corporate little deals you pull, it's still the same folks out there, the same Mr. Karren that did the work.

So I have a concern as a Judge and I know the Safety Board has a concern, not only of safety but also of appearance of fairness in these proceedings, and I know that that's Mr. Dunn's perspective of this case, because those folks up there are obviously skating on this thing and you're here against this case with Mr. Dunn.

Just because they are guilty doesn't mean necessarily that he wasn't, but at the same time, if you could just for a second, and tell Mr. Karren this, if you could put yourself in Mr. Dunn's shoes, how obvious that must look to him.

But the bottom line here is that Mr. Dunn says he did the work. He says he did -- He admits he did the logbook entry.

The testimony of Mr. Brown would indicate that there hasn't been any painting done to that aircraft. The photographs, it would appear there hasn't been any painting done to that, no touchup, airbrush or any of that.

And then the testimony of both Mr. Baas and Mr. Karren, which is supported obliquely, I suppose, by Mr. Brown's testimony, would indicate that those panels were not removed.

Since that is established by a preponderance of the evidence, and preponderance simply means that evidence which seems more probably true than not true, then I think it follows that I must find that Mr. Dunn is in regulatory violation as alleged and the Emergency Order of Revocation will be affirmed.

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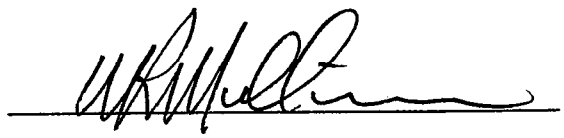
ORDER

JUDGE MULLINS: It is therefore ordered that safety in air commerce and safety in air transportation requires an affirmation of the Administrator's Emergency Order of Revocation as issued; and specifically, as I have discussed it previously on this record, a preponderance of the evidence has established that Mr. Dunn, the Respondent, was in regulatory violation as alleged, and therefore the order is affirmed.



William R. Mullins,

Administrative Law Judge

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JUDGE MULLINS: Mr. Dunn, Mr. Lane, Mr. Dunn has the right to appeal this order and a Notice of Appeal must be filed with the National Transportation Safety Board within two days of this date, and then within five days after that date a brief must be submitted.

You will receive a transcript of this proceeding, but probably not before the five days is up. So I suppose that's a bit of a dilemma.

But Mr. Lane, if you'd step up, I'll hand you a copy of this Rights to Appeal, and it has the office where the appeal needs to go, our office in Washington, and then also the General Counsel's office in Washington where the brief is required to be submitted.

MR. CALLAHAN: And also copies to the FAA; is that correct?

JUDGE MULLINS: Yes, and copies to be sent to the FAA, and that's specified in that order.

Mr. Lane, do you have any question about the Order today?

MR. LANE: Not at all.

JUDGE MULLINS: Does the Administrator?

MR. CALLAHAN: No, Your Honor.

JUDGE MULLINS: All right. Thank you, gentlemen. The hearing is terminated.

[At 3:14 p.m., the hearing was closed.]

SERVED: July 8, 1999

NTSB Order No. EA-4780

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of July, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. FRANK L. MAGNUSSON, Respondent.	)	Docket SE-15054

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on April 8, 1998, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.111(a) and 91.13(a) in connection with a formation flight that departed from Wichita Mid-Continent Airport

[1] The initial decision, an excerpt from the transcript, is attached.

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on December 10, 1996.[2] No sanction was imposed, as an Aviation Safety Reporting Program report had been properly filed. We deny the appeal.

Initially, it is important to address what is not at issue in this case. The Administrator did not charge respondent with deviating from a clearance instruction issued by air traffic control (ATC). The Administrator did not charge respondent with violation of formation flight requirements or of failing properly to see and avoid another aircraft, nor did she attempt to show, independent of the alleged collision hazard, that respondent acted carelessly or recklessly. Instead, the only operational charge brought relates to the alleged collision hazard, and it is that issue to which we must focus our attention.

Collision hazard cases typically have involved two types of situations: one in which we have relied primarily on the proximity of the two aircraft to establish the hazard;[3] and the

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[2] Section 91.111(a) states that no person may operate an aircraft so close to another aircraft as to create a collision hazard. Section 91.13(a) prohibits careless or reckless operations that would endanger the life or property of another. The section 91.13(a) allegation has been pleaded not as a separate, independent charge, but as one that follows automatically from the section 91.111(a) operational violation. See Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at fn. 17, and cases cited there. Accordingly, there is no need to discuss the section 91.13(a) charge further.

[3] See, e.g., Administrator v. Grantham, NTSB Order No. EA-4287 (1994) (aircraft within approximately 100 feet, and so close that the people inside could be identified); Administrator v. Arellano, NTSB Order No. EA-4292 (1994) (50-100 feet horizontal proximity; 100 feet vertical proximity).

other where we have also relied on the perceptions of those involved in finding that a hazard has or has not been created (although proximity may also have been demonstrated).[4] Those cases in which experienced pilots saw the need to take, and did take, evasive action are typical of the second group. In either case, when distances are discussed, witness credibility is often an issue.

Respondent was the pilot of the wing (following) jet aircraft in a two-Cessna Citation formation flight. In accordance with established ATC procedures, the lead aircraft maintained communications with ATC, with the wing aircraft listening. Also in accordance with ATC procedures, the transponder of the wing aircraft was in the standby position (thus emitting no signal). The transponder of the lead aircraft was on.[5] Respondent had radio communication with the lead aircraft, and also was able to communicate with ATC.

The lead aircraft took off first, followed by respondent. Shortly after takeoff, in the midst of a directed turn, respondent lost sight of the lead aircraft.[6] The sun was in his

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[4] See, e.g., Administrator v. Reinhold, NTSB Order No. EA-4185 (1994) (perceptions of experienced aircraft pilot that hazard existed demonstrated by evasive maneuvering); Administrator v. Tamargo, NTSB Order No. EA-4087 (1994) (pilot felt collision imminent and took evasive action).

[5] The unrebutted record indicates that this is done because two primary transponder signals broadcasting so close to each other as formation flight involves cannot be read, or can cause false readings. Tr. at 108, 123.

[6] The aircraft were first cleared to 230 degrees, and once airborne advised to turn to 270 and soon after to 280 degrees.
(continued...)

eyes. Respondent proceeded to roll left, to avoid the last known position of the lead aircraft. After doing so, respondent testified, he saw an aircraft 4-5 miles away that he believed to be his lead aircraft, and flew towards it. At a certain point, respondent recognized that the aircraft he was flying directly towards was not his lead Cessna, but America West Flight 2897, a Boeing 737 aircraft. Although how close the two aircraft came is the subject of disagreement, respondent testified that he then made a steep, 90 degree banking 2G turn, to avoid the 737. Respondent then contacted ATC and the lead aircraft, and they all coordinated a join-up. Respondent believes he was never less than 1500 feet horizontally and 1000 feet vertically from the 737, and radar data was introduced to prove there was always a considerable margin between them.

The 737 pilots testified, on the other hand, that they believed the Cessna came too close, and they felt in danger. The non-flying pilot-in-command characterized it as a "near miss," within 400-450 feet horizontally and 100 feet vertically. Tr. at 24, 30. He stated "It was close. It was too close." Tr. at 32. Although in response to a question from respondent's counsel, the pilot-in-command first said that there was no emergency and no

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(continued...)
The record establishes only that respondent lost sight of the other aircraft somewhere near the time of the 270 degree direction and apparently before the 280 degree instruction. Tr. at 233. Respondent testified that he did not even hear the 280 instruction (Tr. at 248) and did not complete the turn to 270 (Tr. at 253).

collision hazard, he later clarified that he felt the closeness was a hazard, even though he didn't think there would be an actual collision. Tr. at 37, 60. His concern was captured on the ATC tape: "that was close … I could see his smile."[7] Exhibit A-3, at 2209:46 and 2209:50.

The flying first officer's immediate reaction was that respondent was "way too close," although he was going to miss them. Tr. at 71. Although he did not react immediately and take radical evasive action, he did increase the rate of descent and turned a little to the left to distance himself after respondent flew by. Tr. at 74. The first officer also testified that respondent at his closest was at a distance of 400-600 feet horizontally and 100 feet vertically. Tr. at 76.

Respondent here suggests that, if the pilots of the other aircraft did not take evasive action, we should find no collision hazard. Such a premise cannot be accepted, however, as often events occur so fast that we cannot react to them fast enough. This may have been such a case. That does not negate the danger that is created simply by being so close to one another. See Administrator v. Willbanks, 3 NTSB 3632 (1981) (pilots need to be able to avoid collision if other aircraft change heading towards them; respondent would not have been able to, given his close proximity).

[7] Thus contradicting respondent's claim that the FAA pressured the two to testify as they did.

In any case, we find the distance evidence presented by the Administrator, especially in light of the speed at which the two aircraft (both jets) were traveling, to be compelling evidence that a collision hazard was created. Respondent's challenge to the America West crew's eyewitness testimony of those distances comes in the form of radar data which, he argues, demonstrates that the two aircraft were never closer than 1/3 mile. Tr. at 282.[8]

The radar evidence, however, is entitled to little if any weight, and the law judge was correct in rejecting it. During the crucial period, there was a time of 36 seconds (on the radar, between 9:02 and 9:38) where there were no returns for respondent's aircraft, and therefore no information about its position. Respondent's experts plotted two locations on a straight line between the radar returns at 9:02 and 9:38, and argued that this interpolation demonstrated that the distance between the aircraft was always more than the 737 crew testified. The fault in this attempt lies in the fact that there is no evidence that respondent indeed traveled in that straight line. We know that respondent was flying directly towards the 737. We do not know at what point he veered off, and radar interpolations do not tell us. The best evidence of record is the 737 crew's eyewitness testimony. As pilots they have a better-than-normal

[8] Respondent himself testified that he was 1000 feet vertical and 1500 feet horizontal from the 737. Tr. at 236. Even this distance is problematic at the speeds involved.

ability to estimate distance in the air. Accord Administrator v. Reinhold, supra (parties' estimates of distances can be more accurate, given limitations of radar data).[9]

Finally, respondent argues that the Administrator is to blame for any potential danger because FAA policy requires the transponder in the wing aircraft in a formation flight to be in the standby position. As a result, respondent argues, ATC did not have respondent as a primary target on his scope. Therefore, when the two formation aircraft lost separation, ATC did not know it.

We can see both pros and cons to the FAA policy, but regardless, respondent failed to take the reasonable actions he was obliged to take that would have eliminated or lessened the collision hazard. Respondent had a means of communicating both with the lead aircraft and with ATC. He failed to do so, and for quite some time. Tr. at 234-236. The record (which is supported by case law[10]) demonstrates that he should have done so. His choice -- to try to find the lead aircraft visually, rather than announcing the loss -- was the proximate cause of the event. That ATC could have made the first contact and redirected him, had his transponder been on, is not a basis for excusing respondent's error of judgment.[11]

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[9] The point should be obvious, but even one of respondent's experts testified that he could not tell in between actual hits how close the aircraft could have gotten. Tr. at 281.

[10] See Administrator v. Hamer, NTSB Order No. EA-3587 (1992).

[11] Respondent also argues that the secondary radar returns for (continued...)

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The initial decision is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(continued...)
his aircraft were available to ATC, and that the departure controller failed to monitor and act on them when the two formation aircraft diverged. There is absolutely no evidence for this proposition. Rather, the record uniformly supports the conclusion that these secondary targets were not picked up during the crucial period. See, e.g., Tr. at 156-162.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY Administrator Federal Aviation Administration, Complainant, v. FRANK L. MAGNUSSON, Respondent.	Docket Number SE-15054 Citation Numbers FAR 91.111(a) FAR 91.13(a)

Judge Advocate General Courtroom
McConnell Air Force Base
53285 Pratt Court
Wichita, Kansas 67221

Wednesday
April 8, 1998

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

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On behalf of the Respondent:

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
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JANE F. GARVEY Administrator Federal Aviation Administration, Complainant, v. FRANK L. MAGNUSSON, Respondent.	Docket Number SE-15054 Citation Numbers FAR 91.111(a) FAR 91.13(a)

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Wednesday
April 8, 1998

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board held under the provisions of Section 609 of the Federal Aviation Act of 1958, as amended, and that section has now been recodified as Section 44709. And this matter was on for hearing on the appeal of Frank L. Magnusson, who I will refer to as the Respondent, from an order of suspension that seeks to suspend his airman's certificate for a period of 60 days. The order of suspension serves as the complaint in our proceedings.

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and was filed on behalf of the Administrator of the Federal Aviation Administration, through Regional Counsel of the Central Region.

The matter has been heard before me, William R. Mullins. I am an Administrative Law Judge for the National Transportation Safety Board, and pursuant to the board's rules I will issue a bench decision, today.

The matter came on for hearing pursuant to notice that was given to the parties here in Wichita, and specifically, we have been here at Judge Advocate General Courtroom at McConnell Air Force Base. The Administrator was present at all times, and was represented by Mr. Mark Camacho, Esquire, of the Central Region. And the Respondent was present at all times, and was represented by Mr. Ronald P. Williams, Esquire, of the law firm of Morrison and Hecker here in Wichita, and also by Mr. Tom Wakefield, who is the Vice President and General Counsel for Cessna Aircraft.

The parties were afforded a full opportunity to offer evidence, to call, examine, and cross-examine witnesses, and in addition, the parties were given an opportunity to make argument in support of their respective positions.

Mr. Court Reporter, this portion of the

transcript should be headed, discussion.

Discussion and Conclusions

The order of suspension in this matter is fairly brief, and I will just run through it briefly, because it outlines the issues.

Paragraph 1 states that Respondent was holder of a certain airman's certificate, which he admitted.

Paragraph 2 states that, on or about December 10, of 1996, Respondent acted as pilot-in-the-command of civil aircraft November One Two Five Six Eight, a Cessna Model CE-500-52, as the wing aircraft on a flight of two, identified as Citation Test 63, departing from Wichita Mid-Continent Airport, Wichita, Kansas, and that was admitted.

Paragraph 3 states that, prior to takeoff, this flight of two was issued an initial vector of 230 by ATC, followed shortly after by takeoff by a vector of 280, to avoid an opposite direction inbound Boeing 737, operated by America West Airlines as Flight 2897, under the call sign Cactus 897. The Respondent admitted the initial clearance of 230, but denied the 280, apparently because he did not hear it, based on the evidence.

Paragraph 4 states that an incident to the

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above flight, that November One Two Five Eight was involved in a near midair collision with Cactus 897, when he lost sight of his flight leader, failed to call out lost contact, and attempted to maneuver his aircraft into formation with the oncoming America West jetliner. That was denied.

Paragraph 5 states that the Cessna Citation operated by the Respondent came within approximately 4 to 600 feet, horizontally, and 100 feet vertically, of the America West aircraft. And that was denied.

Paragraph 6 was an allegation of a careless operation, which was denied.

And paragraph 7 alleges regulatory violation of FAR 91.111(a), and 91.13(a), 111(a) being the regulation that states that no person may operate an aircraft so close to another as to create a collision hazard, and paragraph (b) is 91.13(a), which states that no person may operate an aircraft in a careless or reckless manner, and that paragraph was denied by the Respondent.

The Administrator called five witnesses. The first was Pat Lynch, who is the captain of the America West aircraft, Cactus 897, and he testified about seeing the aircraft within the 4 to 600 feet horizontally, and 100 feet vertically.

On cross-examination -- and I thought that was kind of interesting -- on cross-examination, he initially said that he did not think there was a collision hazard, and I made some notes at that time, and my thought was, well, this was going to be a short case, because he did not think it was a collision hazard. But then, on further cross-examination, he said that he thought it was a hazard that the aircraft was being operated that close.

There were some parts of his cross-examination that involved the wing tip of the Cessna, and the color. He identified the color of the aircraft as white with a burgundy or brown stripe, when in fact, apparently, it was white with a blue stripe. However, I think, at the closure rate of the two aircraft, he probably was fortunate to identify it as a Cessna 500 series, which he did, and his description, I think, in his testimony, was, it was a straight wing Cessna jet, and, to my knowledge, I don't know of any other corporate jets that have a straight wing, except the Citation. But in any event, he described it as a straight wing Cessna, which is apparently the 500 series. But later, as I said, in his testimony, he said he thought there was a hazard.

The next person to testify was Mike Powell,

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who was the first officer of the America West flight, and Mr. Powell testified that he heard the captain say something about the aircraft. He looked up, and his initial thought was that there was going to be a collision, or some problems, and that was going to require him to take some evasive action. And he said, before he could even do anything, the hazard was abated, or the aircraft turned, or something, something happened in that short period of time, and he did not get around to, or he did not get to the evasive maneuver, although he did say that, even after this time, he made a left turn to increase his separation from the other aircraft.

The third witness called by the Administrator was Mr. Jim Lawson, Aviation Safety Inspector, who is an airworthiness avionics inspector. He was riding the jump seat of the America West aircraft, and he saw the aircraft, although he just saw it as it was turning away, he said, just a flash of metal. He really did not see the aircraft.

Both Mr. Powell and Captain Lynch testified about this 4 to 600 feet, and 100 feet vertically.

Kenneth Locke then was called. He was the air traffic control specialist, working Radar West in Wichita that day. He identified the transcript and his

communication. He did talk about the fact that, apparently, in these formation flights, the FAA asks, or it is their policy not to have the trail aircraft using the transponder, and apparently, this is for identification purposes. But in any event, there was some controversy about that in this particular incident, and the controversy being that it was the Respondent's position that, if he had been allowed to use a discrete code, contrary to that policy, that, as soon he had lost contact with his lead aircraft, then air traffic control would have discovered that, and that is probably true.

Stephen West then was called by the Administrator, who is the aviation safety inspector who, Operations, and both he and Mr. Lawson are assigned to the Wichita Flight Standards District Office. And he was the one that worked up the case. There was some question on cross-examination about why he did not use the NTAP data, but I believe his testimony was, he was not aware until later that it was even available. But, in any event, there was some controversy, through the Respondent, about the NTAP data not being used by the Administrator in this case.

The Administrator had five exhibits. A-1 was a drawing by Captain Lynch, and 1(a) and 1(b) were

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blowups of Captain Lynch's drawing. A-2 was a copy of the transcript of these transmissions between the Cactus 897 air traffic control and also the lead aircraft. A-3 was the tape of that transcript. A-4 is a section guidance table, which all of those exhibits were admitted to. I don't think the sanction guidance table is important, and I will state here, for the record, that there was a timely filed aviation safety reporting system form, filed by Mr. Magnusson, and the Administrator stipulated that it was timely filed, and would be applicable, should there be a finding. And so, when the sanction table came on, in the testimony about it, I indicated to Counsel that, under board's guidance, sanction is not an issue, if there is a timely and appropriately filed and applicable NASA report. And then, Exhibit A-5, which was the last Administrator's exhibit, was a drawing that Mr. Bing made, who was a rebuttal witness, this morning.

Respondent's witness, the first witness was Mr. Magnusson, and Mr. Magnusson has a background of several years with the Naval Flight Test Center at Patuxent Naval Base. And then, he came apparently to Wichita, and as a test pilot for Cessna, and was flying the aircraft, that day. And he testified, as was indicated throughout, that he, as they were turning out

of Wichita to the west, he lost sight of his lead man in the sun, and he rolled. And they never, as I understood the testimony, they were going from 230 to 270, and then got a clearance on to 280, but they never made it to 270, when he lost sight of him, and, rather than continue that turn, he rolled, wings level, and apparently stopped his climb.

But in any event, his testimony was that he saw the America West airliner, thought it was his lead guy, and he started toward it, to join up with it. And as they were closing, he realized that that was not the aircraft that he was supposed to be in formation with. And I think the indication was that he started slowing down, because he realized it had a high closure rate, and then he did some evasive maneuver to the left. The testimony, I believe, was that he did almost a 90-degree turn. But in any event, his testimony was that he was not using his testimony, he had it in the standby mode, and that he never contacted ATC until after this pass by the America West airliner.

There were three experts called by the Respondent, Mr. Beaudoin, Mr. McDermott, and Mr. Vaughn. Mr. Beaudoin and Mr. McDermott pretty well limited their testimony to the NTAP data, and they had drawings, and the NTAP data, and it was their testimony

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about the relative distance to the aircraft. Mr. Vaughn was called as an expert who presented Respondent's Exhibit 10, and he talked about procedure, and what Captain Magnusson did during the flight. And he opined, in his, this document, R-10, in paragraph 7, that the separation or proximity reported by the America West crew was not supported by the radar information provided by the FAA.

Respondent's Exhibit R-1 was a statement of Captain Lynch. R-2, 3, and 4 were Citation photographs, I think two, of the 552, and another one of a 500 series, which shows a different type of wing tip. R-5 was a memo to Mr. Camacho, the FAA attorney, about an NTAP report, and that was several months after the incident. R-6 was the NTAP data that was generated. R-7 was a blowup of one of the pages of the NTAP report. R-8 was an NTAP analysis created by Mr. McDermott. R-9, which was not admitted, was the NASA report, which was stipulated to. And then, R-10 was Mr. Vaughn's document that was provided.

The Administrator called one rebuttal witness, Mr. Bing. He testified about, he is an air traffic control specialist who works with this NTAP data, from Kansas City, and he testified about the margin of error, what he believed was the margin of

error of the NTAP data. And this Mr. McDermott was called in surrebuttal, who talked about these numbers, and basically minimized, or was attempting to minimize, Mr. Bing's testimony.

That basically is all of the information that I received. I want to tell you my observations about this, and also what I believe the National Transportation Safety Board's position is, in these cases, and I did find it unique that there were no cases submitted to me. I believed, when I came out on the road, that this was an identification issue, rather than an issue about -- identification -- I thought the issue in the case that the Respondent was taking the position another aircraft was in the area.

And so, normally, I would go through some of the stuff that I have, but I will share with you what my recollection is. And the first recollection I have, and this has based on a case that I had in Wisconsin, where a general aviation, fixed wing, single-engine aircraft came up behind a helicopter, and sort of got in formation with the helicopter, so he could watch it. I guess they were both going the same direction. And it was a Medivac helicopter, and one of the nurses on board the Medivac helicopter turned and saw the aircraft behind them, back to the left or right,

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whatever site it was, and she related this information to the pilot, who immediately took some evasive action away, and down from the pilot. And I am really paraphrasing this, because these are my recollections of those facts, but I believe that I ruled in favor of the Respondent in that case, and the board reversed me, which they often do. But they reversed me, and said that, you know, whether there was an actual collision hazard or not, the pilot took the evasive action. And if he believed there was, then there was. It was that simple, as I recall, before the board. But that, that makes sense to me.

The testimony here, and the reason I said that comment about Mr. Lynch, Captain Lynch, was that, initially, in his testimony, he said, well, there was not any collision hazard. But then, he later said there was a hazard. He did not identify it as a collision hazard. But if two aircraft are in close proximity, that creates a hazard, then I think that is a collision hazard, whether Captain Lynch characterizes it as such or not.

Mr. Powell clearly identified it as a collision hazard, because his initial reaction was, he thought he was going to have to do something, instantly, to get away from this airplane, and before

he even had time to act on that thought, the collision hazard was gone.

I think it was suggested, during Respondent's case, that there was no evasive action, so there was no collision hazard. ~~midair~~. But these were two jet aircraft, who were basically coming almost, well, pretty close to straight at each other. And if there is anything that was amazing about the case, it was that the Cactus crew even saw the other aircraft. Obviously, Mr. Magnusson saw the other aircraft, because that is the reason he was going over there, to get next to it, because he thought that was the one he was supposed to be on.

Mr. Lawson's testimony, he basically did not see the aircraft until after the thing was over, so I did not put any stock in anything he had to say.

Mr. Locke talked about this procedure, about the transponder, the policy to keep the transponder shut off so that they are not getting this dual feed from a formation flight. The Respondent's counsel made great, took great issue with that policy, and possibly, correctly so.

Captain Magnusson talked about his responsibility, you know, in case of an incident, or in case something went wrong, is to aviate, and navigate, and communicate.

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Well, it was clear in this case, to me, that the aviating was not a problem. All he did was roll wings level, and stop his climb, apparently. Navigating was the problem, and his reaction was to navigate over toward this other aircraft. But it seems to me that, there should have been some communication established, if the communication was only to reach down, and switch the transponder from standby on to full, full tilt, or whatever the other, to on.

And I thought it was interesting, and I mentioned this, because I know Mr. Wakefield is from the Cessna facility, and there may be some provision in Cessna's procedure to contact air traffic control. But sort of the bottom line for this case, is that, this is controlled ~~airspace~~ airspace. It was an IFR flight. And this is a deviation, just like losing an altitude or losing a heading would be a deviation. Mr. Magnusson was responsible for staying on that lead aircraft, because they were IFR, and that was the guy that was setting the pace. And when he lost him, he had deviated from his IFR clearance. And at that point in time, there should be some need to contact air traffic control, because, to paraphrase it a little bit, that is their playground. And if you are in their playground, you talk to them.

But the thing that I thought was interesting is that, apparently, from Mr. Vaughn's evaluation of this, there was no Cessna procedure to even contact ATC, in the case of loss of lead man, or losing visual contact with the lead man. And that could pose some real problems for Cessna, if that is not in that procedure manual, had there been a midair collision. And I would just suggest that that might need to be looked at, if that is not in the procedure. And it is not clear, from Mr. Vaughn's comments, whether or not that is in Cessna's procedure, but he does not talk about it, in his talks.

The other thing I thought was unusual is that Captain Magnusson was not monitoring air traffic control. And I would think that that should be part of a formation flight, so he can hear these changes. At least, if he loses sight of his lead man, he will know where he went, or generally where he went. But if he did not know he was turning to 280, you know, they might have been found.

And certainly, I think this transition from the airport out to the test site area, everybody needs to relook at the way that business is going on.

But, the bottom line for me, here, today, is, first of all, two things. First of all, I believe

there was established by a preponderance of the evidence that the flight crew of the America West believed there was a collision hazard.

Certainly, from Captain Powell, or soon-to-be Captain Powell, the first officer's testimony, he believed it, but it was, the thing was gone. There was no time to make any evasive action, particularly because we have two jets coming almost toward each other, and the closure rate, at, even from the Respondent, was a thousand feet per minute. But, under the circumstances out there, there was a potential, because of this loss of visual contact with his lead man, and in an attempt to join up on the wrong aircraft, there certainly was the potential for a collision hazard. And I think the Safety Board looks at that, also.

And, of course, that having been established, I think there is a residual violation of the careless operation.

And so, based on this discussion, and these findings, I would have to find an affirmation of the Administrator's order.

Now, the NTAP data, based on the testimony, the NTAP data would have been important, if there had not been any visual sighting by the America West crew.

But I think, once they saw the aircraft, and they both opined that it was 4 to 600 feet horizontally, and 100 feet vertically, you know, I don't think the NTAP data can change what they saw. And I don't think their testimony was, and their credibility, was set aside, certainly not by the NTAP data.

And I am not dismissing the NTAP data, although I tend to go with Mr. Williams. I think the Administrator's response to it will change my mindset about it, as, when I see it, again, and I see it, oh, two or three times a year. But, again, for my finding, here, today, I have to turn on what the air crew of the other aircraft, the America West aircraft, and their testimony. And based on that, I am finding the regulatory violations, as alleged. As I said, there was a stipulation about the NASA report, and so, there will be no sanction imposed based on that stipulation.

Mr. Court Reporter, this caption of the transcript should be captioned, Order.

Findings and Order

It is therefore ordered, That safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's order of suspension, as issued. Specifically, I find that there

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was established, by a preponderance of the evidence, the regulatory violations alleged, that is, FAR 91.111(a), and FAR 91.13(a), but under the stipulation that there was a timely filed NASA report, I find that no sanction should be imposed, and that will be the order. And here, Mr. Court Reporter, put a signature line for my signature.

Dated at _____, _____, this __th day of _____, 19__.

5/11/98

HONORABLE WILLIAM R. MULLINS
Administrative Law Judge

Appeal

Mr. Magnusson, you have the right to appeal my order, today, and you may do so by filing your notice of appeal with the National Transportation Safety Board within ten days. If you file your notice of appeal within ten days, then the brief needs to be filed in support of that appeal within 50 days of this date. The appeal goes to the Office of Judges, at the National Transportation Safety Board, and I will hand you this appellate rights sheet, that has that address: Office of Judges, NTSB, 490 L'Enfant Plaza East, SW, Washington, D.C. 20594-2000. And the brief goes to the

Office of General Counsel, also at the National Transportation Safety Board, at the same address.

Mr. Williams, I would ask that you come up, and I will hand you a copy of this rights to appeal, and I would like to record to reflect that I have handed Respondent's counsel a copy of the appellate rights.

MR. WILLIAMS: We acknowledge that, Your Honor.

JUDGE MULLINS: Okay. Thank you.

Does the Respondent have any question about the order?

MR. WILLIAMS: We do not, Your Honor.

JUDGE MULLINS: Does the Administrator have any questions?

MR. CAMACHO: No, Your Honor.

JUDGE MULLINS: All right. Thank you, gentlemen. That terminates the hearing.

(Whereupon, at 11:50 a.m., the hearing was closed.)

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SERVED: June 11, 1999

NTSB Order No. EA-4772

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. LOREN G. URIDEL, Respondent.	Dockets SE-15289 SE-15364

OPINION AND ORDER

The respondent, pro se, has appealed from the October 14, 1998 order of Administrative Law Judge William A. Pope, II, granting the Administrator's motion for summary judgment,[1] thus affirming orders of the Administrator, dated May 28 and July 30, 1998, revoking respondent's commercial pilot and airman mechanic

[1]The law judge's order is attached. Respondent filed an appeal brief and the Administrator filed a reply.

The cases were consolidated on August 28, 1998.

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certificates, pursuant to sections 61.15(a)(2) and 65.12(a)(2) of the Federal Aviation Regulations (FARs), 14 C.F.R. §§ 61.15(a)(2) and 65.12(a)(2), for criminal convictions for drug offenses related to participation in commercial drug activity.[2] As discussed below, we deny the appeal.

We have little to add to the law judge's thorough analysis of the issue. As noted, the Administrator alleged and respondent admitted that

> By corrected judgement of on or about October 8, 1992, *nunc pro tunc* to September 21, 1992, in the Circuit Court, Seventh Judicial Circuit, Flager County, Florida, you were found guilty of the following crimes:
>
> (a) Conspiracy to Traffic in Cannabis, a first degree felony, and
> (b) Attempted Sale of Cannabis, a third degree felony.

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[2]In an apparent oversight, the law judge, while affirming both of the Administrator's revocation orders (complaints), referenced only the violation of section 61.15(a), cited in the May 28, 1998 order, not the section 65.12(a) violation, cited in the July 30, 1998 order. The regulations are identical, one applies to pilot certificates, and the other applies to, among others, mechanic certificates. It is clear from the law judge's discussion that he meant to grant the motion as to both complaints and, therefore, we will correct the omission in this opinion and order.

FAR section 61.15 provides, in pertinent part:

> § 61.15 **Offenses involving alcohol or drugs.**
>
> (a) A conviction for the violation of any Federal or State statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--
>
> * * * *
>
> (2) Suspension or revocation of any certificate or rating issued under this part.

That an aircraft was not involved in the underlying criminal offense is of no moment. Respondent's convictions were for activities evidencing participation in commercial drug activity. This shows that he lacks the care, judgment, and responsibility required of a certificate holder. See Administrator v. Piro, NTSB Order No. EA-4049 at 3-4 (1993), aff'd, 66 F.3d 335 (9th Cir. 1995). Revocation for such violations found under FAR sections 61.15(a)(2) and 65.12(a)(2) is consistent with policy and precedent. See, e.g., Administrator v. Trupei, NTSB Order No. EA-4661 (1998).

Respondent has identified no error in the law judge's grant of summary judgment. No issues of material fact remain to be decided. We will not delve into the underlying facts of his criminal conviction. See Administrator v. Berryhill, NTSB Order No. EA-4414 at 4 (1996), and cases cited therein. The stale complaint rule does not apply to cases such as this where a lack of qualifications is presented. Administrator v. Hale, NTSB Order No. EA-4590 at 3 (1997). Finally, economic impact is not a proper basis to mitigate an otherwise supportable sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's order granting summary judgment is affirmed, consistent with this opinion; and

3. The revocation of respondent's commercial pilot and airman mechanic certificates shall begin 30 days after the service date indicated on this opinion and order.[3]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[3]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).

SERVED: October 14, 1998

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. LOREN G. URIDEL, Respondent.	Dockets SE-15289 SE-15364

ORDER GRANTING ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT

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(BY FAX)

Respondent, through counsel, has appealed to the National Transportation Safety Board ("NTSB") from orders dated May 28 and July 30, 1998, by which the Administrator of the Federal Aviation Administration ("FAA") revoked, respectively, his commercial pilot and airman mechanic certificates pursuant to § 61.15(a)(2) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.).[1]

[1]FAR § 61.15(a)(2) provides as follows:

§ 61.15 Offenses involving alcohol or drugs.
(a) A conviction for the violation of any Federal or [S]tate statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of

(continued...)

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Following respondent's submission of those appeals, the revocation orders were reissued by the Administrator as the complaints in these proceedings,[2] which were later consolidated on August 28, 1998. Aside from separately identifying the certificates affected (Commercial Pilot Certificate No. 1425837 and Mechanic Certificate No. 137182 with Airframe and Powerplant Ratings), those orders contain the same essential factual allegations, which are: that, on or about October 8, 1992, respondent was found guilty in the Circuit Court, Seventh Judicial Circuit, Flagler County, Florida, of both Conspiracy to Traffic in Cannabis, a first-degree felony, and Attempted Sale of Cannabis, a third-degree felony; and that such felony convictions were based upon violations of state statutes relating to a controlled substance, and subjected respondent to confinement for not less than five years. In addition, the complaints allege that the aforesaid convictions demonstrate that respondent lacks the qualifications required of a holder of an airman certificate.

On September 18, counsel for the Administrator filed a motion for summary judgment herein, asserting that, based on the undisputed material facts of this case, the Administrator is entitled to judgment as a matter of law. A response in reply to that motion has since been received from respondent's counsel. Upon a thorough review of the entire record in this case, including the Administrator's motion and supporting documentation submitted therewith and respondent's reply thereto, the undersigned will, for the reasons set forth below, grant the motion, enter summary judgment affirming the Administrator's revocation of respondent's certificates, and terminate this proceeding.

Respondent admits to the convictions referred to in the complaints.[3] However, he points out that he was, as a result of those convictions, incarcerated for a period of two years rather than for five years, as is suggested therein.[4] Moreover,

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[1](...continued)
narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for --

* * * * *

(2) Suspension or revocation of any certificate or rating issued under this part."

[2]On August 21, 1998, the Administrator amended her July 30 order of revocation, to add a reference to the May 28 revocation order. That amended order of revocation serves as the complaint in Dkt. SE-15364.

[3]See Answer ¶ 1; Respondent's Response to Motion for Summary Judgment ("Reply") at 1.

[4]See Answer ¶ 2; Reply at 2-3. It should, however, be noted that the complaints state that respondent was "subjected . . . to confinement for not less than five years" (emphasis added), but

(continued...)

respondent denies the Administrator's allegation that he lacks the qualifications to hold any airman certificate as a result of those convictions;[5] notes that FAR § 61.15(a)(2) permits the suspension, as well as the revocation, of certificates held by an airman convicted of a drug offense;[6] and asserts that, as a result, there remain material factual issues to be resolved at a hearing.[7]

In connection with her summary judgment motion, the Administrator has submitted copies of official court records which confirm the convictions referred to in the complaints.[8] Thus, it is clear, from both the court records and respondent's own admissions, that he was convicted of offenses stemming from participation in commercial drug activity. While respondent

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[4](...continued)
do not set forth the length time he actually served in prison. According to court records furnished by the Administrator, respondent was sentenced to imprisonment for concurrent terms of nine years for conspiracy to traffic in cannabis and five years for attempted cannabis sale, with credit for time served (477 days). See Ex. 3 attached to Administrator's Motion for Summary Judgment ("Motion"). Such records also relate that a minimum mandatory sentence of three years was imposed. Id.

[5]Answer ¶ 3.

[6]Reply at 2-3.

[7]Id. at 4. Respondent has also averred as an affirmative defense in his answer that the Administrator's complaint is susceptible to dismissal as stale under Rule 33 of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.33). Under Rule 33, a complaint is subject to dismissal if it sets forth allegations of offenses occurring more than 6 months before the airman in question is advised -- typically through the issuance of a notice of proposed certificate action ("NOPCA") -- as to the reasons an action is proposed against his certificate, unless the Administrator either establishes good cause for the delay in the issuance of such notice or presents in the complaint an issue of lack of qualification. Here, a NOPCA was mailed to respondent on March 19, 1997 (Ex. 4 attached to Administrator's Motion), which was more than four years after his October 1992 conviction occurred. However, any delay in the issuance of the NOPCA beyond the relevant six-month period cannot serve as a basis for the dismissal of the complaints herein because their allegations raise a legitimate issue of lack of qualification. See discussion infra.

[8]Exs. 2 and 3 attached to Administrator's Motion.

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avers that he was imprisoned for only for two years for these offenses, the length of time served by respondent is irrelevant, as § 61.15(a)(2) becomes applicable upon a conviction for the "violation of [a] statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of" narcotics, without regard to the sentence imposed or served. Thus, any argument that the Administrator's action against respondent's certificate is somehow flawed because the complaints mischaracterized the length of respondent's prison sentence must be rejected.[9]

Respondent's main assertion -- that he is entitled to demonstrate at a hearing that the convictions in question may warrant a suspension of his airman certificates, rather than the revocation imposed by the Administrator -- is, similarly, unavailing. In this regard, the Board has consistently held in recent years that an airman certificate holder who participates in commercial drug activity thereby demonstrates that he lacks the degree of care, judgment and responsibility required to hold such a certificate, and that revocation is, thus, the proper sanction to be imposed in such cases under § 61.15(a)(2). The leading case on this point is Administrator v. Piro, NTSB Order EA-4049 at 3-4 (1993), affirmed sub nom., Piro v. Nat'l Transp. Safety Bd., 66 F. 3d 335 (9th Cir. 1995).[10] The Board has also

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[9]It is, in addition, not wholly clear that the complaints misstated the sentence imposed upon respondent by the court. See n.4, supra.

[10]The Board has echoed this sentiment, subsequent to Piro, on numerous occasions. See Administrator v. Nave, NTSB Order EA-4257 at 2-3 (1994); Administrator v. Beauchemin, NTSB Order EA-4371 at 5 (1995); Administrator v. Pimental, NTSB Order EA-4382 at 3-5 (1995); Administrator v. Berryhill, NTSB Order EA-4414 at 5 (1996); Administrator v. Cole, NTSB Order EA-4418 at 4 (1996); Administrator v. Medvecky, NTSB Order EA-4447 at 4 (1996); Administrator v. Helms, NTSB Order EA-4506 at 3 (1996); Administrator v. D'Antonio, NTSB Order EA-4526 at 6 (1997); Administrator v. Hale, NTSB Order EA-4590 at 3 (1997); and Administrator v. Trupei, NTSB Order EA-4661 at 3 (1998).

In his reply, respondent cites Administrator v. Butchkosky, NTSB Order EA-4229 (1994), for the proposition that there are cases in which FAR § 61.15(a)(2) is applicable but the sanction of suspension is more appropriate than revocation. However, it is well-settled, from the Board decisions cited above, that this is not the case where the conviction in question results from participation in commercial drug activity. The Butchkosky case involved an appeal by an airman from a certificate revocation under FAR § 67.20(a)(1), as well as § 61.15(a)(2), for his alleged intentional falsification of a medical certificate

(continued...)

held, in Administrator v. Poole, NTSB Order EA-4425 (1996) and Administrator v. Adcock, NTSB Order EA-4507 (1996), that where -- as here -- an airman's conviction of involvement in a commercial drug enterprise is undisputed, the entry of summary judgment sustaining an order of revocation is warranted. Under these circumstances, the undersigned must grant the Administrator's motion for summary judgment and affirm her orders revoking respondent's commercial pilot and airman mechanic certificates.

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[10](...continued)
application stemming from his failure to disclose his drug conviction in response to a question thereon. After an NTSB administrative law judge entered summary judgment in favor of the Administrator, affirming the order of revocation "in all respects," the airman appealed to the full Board, arguing that a factual question remained as to whether his response to the question on the medical certificate was intentionally false, and that the § 61.15(a)(2) charge might not independently support the revocation because his drug offense did not involve the use of an aircraft. There was no mention, in either Order EA-4229 or the appealed judge's order, as to whether or not the airman's conviction stemmed from commercial drug activity. The Board remanded the case, in part because of the lack of evidence as to scienter on the § 67.20(a)(1) charge. It also noted that:

> [W]e think that some . . . cases may require a hearing to evaluate the circumstances surrounding the [drug] offense in order to determine whether or not it was so egregious as to demonstrate a lack of qualifications to hold an airman certificate. While the record might, in some cases, contain enough information to make such an evaluation without a hearing, in other cases it may not. However, we see no need to decide in the context of this appeal which category this case falls into. In light of our decision to remand this case on the falsification charge, we think it would be appropriate to allow respondent the opportunity at that time to present evidence and argument on that issue as well. (NTSB Order EA-4229 at 6-7.)

The evidence subsequently established that the airman had been convicted of conspiracy to import marijuana, importation of marijuana and possession of marijuana with intent to distribute (Administrator v. Butchkosky, NTSB Order EA-4407 at 2 (1995), petition for modification denied, NTSB Order EA-4459 (1996)), and the Board, in affirming the revocation order on appeal from the judge's initial decision on remand, noted that "precedent certainly supports revocation for a conviction of offenses, not involving [the use of] an aircraft, that pertain to the importation and distribution of illegal drugs (id. at 4).

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THEREFORE, IT IS ORDERED that the Administrator's motion for summary judgment is GRANTED and that this proceeding is hereby TERMINATED.

Entered this 14th day of October, 1998, at Washington, D.C.

William A. Pope, II

WILLIAM A. POPE, II
Administrative Law Judge

SERVED: June 17, 1999

NTSB Order No. EA-4773

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. SIEGFRIED PITTET, Respondent.	Docket SE-15103

ORDER DENYING RECONSIDERATION

Respondent seeks reconsideration of NTSB Order No. EA-4749, served March 11, 1999, wherein the Board affirmed the Administrator's order alleging that respondent violated sections 91.7(a) and 91.13(a) of the Federal Aviation Regulations.[1]

Respondent's petition merely repeats arguments that were thoroughly considered by the Board in connection with its original decision. We discern no error in our original opinion and order.[2]

[1] The Administrator waived the 30-day suspension of respondent's airline transport pilot ("ATP") certificate because he filed a qualifying Aviation Safety Reporting System report.

[2] Respondent misconstrues the applicability of the *Lindstam* doctrine to his case. The *Lindstam* doctrine merely shifts the burden of persuasion; it does not affect the burden of proof. As
(continued ...)
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ACCORDINGLY, IT IS ORDERED THAT:

The petition for reconsideration is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above order. GOGLIA, Member, did not participate.

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we indicated in our original opinion and order, the evidence supports the Administrator's allegations. In this regard, we note that respondent's contention that all 18 cowl screws must have fallen out after his preflight inspection is not persuasive in light of the evidence in this record.

SERVED: June 21, 1999

NTSB Order No. EA-4774

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. JOHN JOSEPH RICHARD and CRAIG WILLIAM HILLMAN, Respondents.	Dockets SE-15291 and SE-15292

OPINION AND ORDER

The respondents have appealed the oral initial decision and order issued by Administrative Law Judge Patrick G. Geraghty on August 25, 1998, at the conclusion of an evidentiary hearing.[1] In that decision, the law judge affirmed the Administrator's

[1]An excerpt of the hearing transcript containing the initial decision is attached.

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orders of suspension with waiver of penalty,[2] on allegations of respondents' violations of Federal Aviation Regulations (FAR) section 121.315(c), because of their failure to adequately follow the "before starting engine" checklist prior to departure on Frontier Airlines Flight #43, on November 24, 1997. Respondent Richard served as pilot in command of the flight (captain), and respondent Hillman was second in command (first officer).

Respondents raise several issues on appeal. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's initial decision. In the Board's view, none of the issues raised by respondents have merit, and their appeal is denied, as explained below.

The record establishes that shortly after departure of the subject flight, respondents were forced to return to their originating city because the aircraft would not pressurize. When Frontier maintenance personnel boarded the aircraft upon its return, it was discovered that all six circuit breakers on the pressurization (P-6) control panel were in the out, or "tripped" position, i.e., they had popped out and a white collar on each of the circuit breakers was visible.[3] Maintenance personnel simply reset the circuit breakers and ran the system in all three modes, automatic, standby, and manual, to insure that it worked. No

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[2]The Administrator waived the suspension of respondents' airline transport pilot certificates under the provisions of the Aviation Safety Reporting Program.

[3]The circuit breaker panel is located directly behind the first officer's seat and is visible to the captain if he were to look over his right shoulder.

maintenance discrepancies were logged, and the aircraft once again departed.

According to William Gregory, the line maintenance supervisor who discovered the circuit breakers in the out position, when he told respondents of his discovery, respondent Richard replied, "Oh, s--t." (TR-52). In all of his 38 years of experience working on the Boeing 737, Mr. Gregory, who also holds a commercial pilot certificate, has never seen or heard of all six circuit breakers being tripped at the same time. In his opinion, such an occurrence is highly unlikely because each of the six circuit breakers is tied to one of three independent systems. He also testified that this particular aircraft has had neither a prior or subsequent history of malfunction in the pressurization system.

Richard Morris is an aerospace engineer employed in the FAA's Aircraft Certification office in Seattle. His primary duties involve the certification of cabin pressure systems. Prior to joining the FAA in 1991, he worked as an Air Force engineer on-site with Boeing. Mr. Morris testified that he has never heard of all six circuit breakers popping at once. According to Mr. Morris, the six circuit breakers are tied to five different power sources, and the only way he could imagine all six popping at the same time would be if there was a power failure or electrical surge, but that, he noted, would affect other systems, which is not the case here. Mr. Morris also testified that he knows of no Airworthiness Directives relating

to problems with circuit breakers in the Boeing 737-200 aircraft.

Peter Lee is the FAA's Principal Operations Inspector for Frontier Airlines. He testified that Frontier Airlines' Flight Standards Manual, a portion of which was introduced into evidence as Administrator's Exhibit A-6, contains a "before starting engine" checklist. The checklist indicates that the crew ("CR") must insure that the circuit breakers are checked *and* that they are in the on position ("CKD/ON"). Some other items on this checklist call for the item to be checked only ("CKD") *or* on only ("ON"); some items are assigned to the captain only ("C") or the first officer only ("F"). Inspector Lee opined that the checklist assigns both the captain and the first officer the responsibility of checking the P-6 panel before engine start, and both must check the P-6 panel to insure that the circuit breakers are actually on. Inspector Lee concluded that the "before starting engine" checklist could not have been adequately followed by either respondent because, (1) there were no pressurization problems with the aircraft before or after this incident; (2) no maintenance was required on the aircraft after its return except for the resetting of the breakers; and (3) he has never heard of all six circuit breakers popping out at one time.

Respondent Richard testified that he *believes* that he glanced down at the circuit breakers when he entered the cockpit, but asserts in the alternative that he was, in any event, entitled to rely on respondent Hillman's response that the

circuit breakers had been checked. He argues that the "before starting engine" checklist requires only a crew response to ensure that the first officer had checked the circuit breakers during his preflight inspection.[4]

Respondent Hillman testified that he performed a normal preflight inspection, and that he looked at and checked all of the circuit breaker panels. In addition, he testified, when he entered the cockpit he discovered his oxygen mask was on the floor. As he bent down to retrieve it, he claims that he checked the circuit breakers again and saw that they were set. Respondent Hillman also testified that the "before starting engine" checklist is intended only to verify that the preflight inspection has been properly performed.

Jimmie Wyche is the executive vice president of operations for Frontier Airlines. He testified that the purpose of the "before starting engine" checklist is to confirm that critical items have been performed during the preflight inspection. It is not a "read and do" checklist, he explained. Mr. Wyche testified that, generally, the first officer performs the preflight inspection and then the captain will do a visual inspection, but that the captain is not required to recheck the first officer's work.

Brian Durbin, who is also a first officer for Frontier

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[4]Although this was their first flight together, respondent Richard testified that he was aware that respondent Hillman was a conscientious and qualified first officer and he assumed that he had properly performed his preflight inspection. (TR-85).

Airlines, testified that Page 15-20 of the Frontier Flight Standards Manual provides that either the captain or the first officer can perform the "Preliminary cockpit preparization" (sic), and that it is as of that time when the Manual specifically requires the P-6 panel to be checked. Another portion of the Frontier Standard Operating Procedures apparently states, "before starting the engine, the captain calls for the before start checklist. The first officer will read the before start checklist down to the line with responses as indicated. All items down to the line should have been completed with the panel scan flow." (TR-155).[5]

Edwin Stucka testified that he was the maintenance person who taxied the aircraft to the hangar prior to the subject flight. He checked the circuit breakers at the hangar before leaving, as required by the maintenance checklist. The circuit breakers were set in the "on" position when he deplaned.

At the close of the Administrator's case, respondents moved to dismiss the orders, arguing that their performance or nonperformance of the "before starting engine" checklist did not occur "[d]uring this flight," as alleged in the Administrator's orders. The law judge denied the motion, ruling that for purposes of the Administrator's orders, the flight began when respondents accepted the aircraft and encompassed their preflight

[5]Neither portion of the Manual referred to by this witness was offered into evidence.

activities.[6]

The law judge found that the Administrator had produced sufficient circumstantial evidence to establish a *prima facie* case, and that the burden of going forward then shifted to respondents to establish that some other reasonable explanation existed to explain why all of the circuit breakers were found in the open position. The law judge further ruled that respondents had failed to meet that burden. He concluded that the checklist had not been adequately accomplished in accordance with the Flight Standards Manual. We agree.

Respondents' efforts to disparage the credibility of the Administrator's witnesses are unavailing. The Administrator's case was based on the requirements contained in the Flight Standards Manual. FAA Inspector Lee merely identified the possibility of a violation when he determined that an aircraft had been returned to the airport shortly after departure, but that no mechanical deficiency had ever been logged in the aircraft logbook to explain this unusual event. His estimation of the number of hours he has logged in a 737, whether 3,000 hours or 5,000, is simply irrelevant to this matter. He testified as the investigating officer, not as an expert witness, as respondents suggest. Respondents' attacks on the testimony of Mr. Morris are also unjustified. Mr. Morris' expertise is on

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[6]Respondents assert on appeal that this ruling was erroneous. We disagree. Paragraph 3 of the Administrator's order is in no way confusing. It states clearly that the allegations relate to a faulty preflight inspection that occurred just prior to their operation of N214AU on November 24, 1997.

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cabin pressure issues, and it is based on his mechanical and aerospace engineering degrees as well as his employment history with the Air Force and Boeing prior to joining the FAA. He was never offered by the Administrator as an expert on electrical engineering issues, and respondents' counsel's efforts to cross-examine him on such issues do not make him so.[7]

In any event, to the extent that credibility of the witnesses was in issue, we concur with the law judge.[8] Respondent Hillman testified that he looked at the panel when he first performed his preflight inspection, and that he looked at it again when he bent down in the cockpit to retrieve his oxygen mask. He describes his performance of the "before starting engine" checklist generally, saying that he "did the normal below-the-line functions...." (TR-130). In response to the FAA's Letter of Investigation, respondent Richard claimed that both he and respondent Hillman checked their respective circuit breakers and responded with "checked," after Hillman called out "circuit/radio switches" (Administrator's Exhibit A-7), but he was much less certain at the hearing, where he stated that he *believes* he glanced down at the panel. Moreover, respondent

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(..continued)
Respondents had sufficient notice of the charges against them.

[7]The law judge properly ruled that respondents' counsel could not pose hypothetical questions that were not based on any facts or other evidence known by him to be true.

[8]The law judge notes in his decision (TR-198) that this case is both a circumstantial case and a credibility case, although he does not articulate specific credibility findings.

Richard's testimony that it did not matter anyway because he was entitled to rely on Hillman's response, likely affected the law judge's evaluation of his demeanor.[9] Thus, the law judge's conclusion that respondents had not adequately performed the checklist was in part supported by his credibility determination against respondents, based on the many inconsistencies in their various statements. We concur in the law judge's credibility findings.

Finally, respondents contend that the law judge's decision should be reversed because the Administrator failed to prove that all six circuit breakers were out at the time that the "before starting engine" checklist was read. Respondents' argument on the issue of burden of proof is misplaced. It was not necessary for the Administrator to prove why the circuit breakers were popped, nor was it the Administrator's burden to prove exactly when they popped. There is no dispute that the aircraft failed to pressurize immediately after takeoff because the circuit

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[9]Nor does respondent Richard ever address why, if he was so certain that the circuit breakers were on before takeoff, he responded with an expletive when he was told by the mechanic what had happened. In any event, we reject his reliance argument. Page 15-2 of the Flight Standards Manual provides in part that for ground operation, "flight crewmember duties have been organized in accordance with an area of responsibility concept. The panel scan diagram (page 15-3) describes the crewmember's area of responsibility and scan flow pattern for each panel." Page 15-3, which is also in evidence, shows that the AFT Electronic Panels must be scanned by both the captain and the first officer. The P-6 panel *is* an aft electronic panel. Administrator's Exhibit A-6. Thus, it was only after both respondents had scanned each panel of circuit breakers that they could, while going over the "before starting engine checklist," respond "checked" to each other, in response to the item, "CKD/ON."

breakers were off. The Administrator showed that no mechanical discrepancies were ever logged to explain this incident, and that the pressurization system of this aircraft had no history of mechanical problems. The Administrator also established that no repairs were required in order to return the aircraft to service. Finally, the Administrator produced convincing evidence that it was highly unlikely that all six circuit breakers could be tripped at once. Having produced sufficient circumstantial evidence from which the law judge could reasonably infer that respondents would have discovered that the circuit breakers were off had they adequately performed the checklist, it was then incumbent on respondents to offer some other reasonable explanation for this incident. Instead, respondents offered nothing. Respondents' counsel's questions on cross-examination concerning electrical systems, his definition, for the first time in his appeal brief, of the term "inductive kick," or, for that matter, his reliance on his own clients' unqualified opinions about the electrical workings of this aircraft, certainly cannot be given the same weight we would have accorded an expert in electrical engineering, had one been produced by respondents. It was, therefore, reasonable for the law judge to conclude that the Administrator had established, by a preponderance of the evidence, that respondents had violated FAR section 121.315(c).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied; and

2. The Administrator's orders and the initial decision affirming those orders are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not participate.

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR Federal Aviation Administration, Complainant, v. JOHN JOSEPH RICHARD, Respondent, and ADMINISTRATOR Federal Aviation Administration, Complainant, v. CRAIG WILLIAM HILLMAN, Respondent.	Docket Number SE-15291 Consolidated Docket Number SE-~~1592~~ /5292

ORAL INITIAL DECISION AND ORDER

BY JUDGE PATRICK G. GERAGHTY:

This has been a proceeding before the National Transportation Safety Board on the respective appeals of Captain John Richard and First Officer Craig Hillman from respective Orders of Suspension with Waiver of Penalty which were issued against them by the Administrator, Federal Aviation Administration, the Complainant herein.

Throughout the remainder of the discussion,

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both the individuals, Captain Richard and First Officer Hillman, will be referred to as the Respondents herein.

The respective Orders, as I indicate, do serve as the Complaints herein and were filed on behalf of the Administrator, the Complainant, through her Regional Counsel of the Northwest Mountain Region.

By prior Order, the two proceedings were consolidated for trial, and pursuant to Notice, the matters came on for trial on August 25th, 1998, in Denver, Colorado. The Complainant was represented by one of her Staff Counsel, Brent Pope, Esquire, of the Regional Counsel's Office. Both Respondents were present at all times and were represented by their attorney, Mark Conlin, Esquire, of Spokane, Washington.

The parties were afforded the opportunity to offer evidence, to call, examine and cross examine witnesses, and to make argument in support of their respective positions.

All the evidence, both oral and documentary, has been considered, and in the discussion, I restrict myself only to those items which I highlight for purposes of illustrating the conclusion that I reach herein.

AGREEMENT

By pleading, it was agreed that there was no dispute as to the numbered Paragraphs 1 and 2 in the respective complaints. Therefore, those matters are taken as having been established for purposes of the decision.

DISCUSSION

The Complainant herein has issued the Orders of Suspension against the respective Respondents based upon the allegation that as a consequence of their admitted operation, one as Captain and the other as First Officer, for Frontier Airlines Flight Number 43, on November 24th, 1997, so operated the flight as to be in regulatory violation of Section 121.315(c) of the Federal Aviation Regulations. That regulation as pertinent herein requires that the crew follow the approved cockpit check procedures when operating an aircraft.

There is no dispute as to the objective factual basis of this incident; that is, that the two Respondents were in fact operating respectively as pilot-in-command and First Officer of this particular flight, that upon their departure in the late afternoon on the date in question from Denver, Colorado, with a destination of Salt Lake City, after actual take-off and some time during the climb-out apparently, it was

realized that the aircraft was not pressurizing. Therefore, a check was done within the aircraft using a quick check handbook, also communicating with ATC as to the problem, and the aircraft ultimately returned to Denver because of the fact the aircraft would not pressurize.

Once the aircraft was back on the ground at Denver, a check was done to the aircraft which I will discuss in some more detail subsequently, but ultimately was found that all six circuit breakers which go to the pressurization system of this particular aircraft were in the open or out or popped position; that is, the pressurization control circuit breakers, which, you know, are six in number, as I've indicated.

These are located on a panel which is behind the First Officer's seat, and it is in the lowest section of what is identified as Panel P-6.

Mr. Lee is the Principal Operation Inspector for Frontier Airlines, and he has, of course, a long history of aviation experience and has testified he had about 5,000 hours in 737s.

This matter first came to his attention, on his testimony, when he was going through mechanical irregularity reports and noted that this particular

flight had departed and returned and then departed again after only having reset circuit breakers. This apparently aroused his interest or curiosity, and therefore,he did a further check as to what was going on with this particular incident.

He ultimately determined, as he testified to, that the aircraft had had no prior history of pressurization system problems and found that the aircraft in fact had operated subsequent to the circuit breakers being reset and for several days thereafter with no further problems being reported to the pressurization system, [redacted] In fact, on his testimony, checking maintenance records of Frontier, he found no record of maintenance with respect to the pressurization system having occurred either prior to this particular flight, that is, the November 24, '97, flight, nor subsequently. Therefore, the only maintenance, if one wants to call it that, was the resetting of these six circuit breakers.

Mr. Lee also testified with respect to the Frontier Flight Standards Manual. This contains the -- what is set forth as the normal checklist for the 737-200 which is the type of aircraft that was being operated on the date in question. There is the before-starting checklist here. There is also a code

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designated on this checklist, and there's no indication that this checklist is not in fact the checklist that was in existence at the time in question.

At the top, it calls out the designations as "CR" meaning crew, which would mean all the crew or in this case both, "C" means Captain, "F" means First Officer, and "CF" means either Captain or First Officer. So, there is an indication where either one could do something on this particular checklist.

This was not an intermediate stop flight. It was an origination departure from Denver. Therefore, the entire checklist had to be completed on the testimony as I heard it.

As to the item in question, it calls out: "circuit breakers/radio switches." They must be checked and on, and in the code after that, in parentheses, it says "CR", which means crew. According to Mr. Lee, what this means is that either the Captain or the First Officer or both are required to respond to assure that the circuit breakers and the radio switches on that item are in fact set correctly. For the circuit breakers, that means in and set.

On his opinion, he expressed the opinion that based upon his lack of finding of any maintenance problems, except for the resetting of the circuit

breakers, that there was in fact no system fault; that is, any mechanical or electrical problem with the system.

Since there's no record of any maintenance or systems check with this aircraft, and the pressurization system apparently operated normally both on the flight that was then conducted to Salt Lake City and back and for several days thereafter, there's no contradictory evidence to that effect.

He further stated that if the circuit breakers had failed because of any mechanical irregularity, a discrepancy would have to be written up, other than just six circuit breakers popped, but that it would be a maintenance item, and it would be a requirement for that item or the system itself to be checked and any repair of a discrepancy or maintenance problem entered prior to the operation of the aircraft.

It would appear to me in fact that there were a mechanical problem or electrical problem which caused all six circuit breakers to pop. It would also raise a question as to the airworthiness of the aircraft.

But in any event, the testimony was then obtained from Mr. William Gregory. He's a line maintenance supervisor for Frontier, holds an Airframe and Power Plant Certificate and has held it, on his

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testimony, for 30 years.

He stated that with respect to 737s, he's worked on them since the aircraft apparently came into the aviation system; that is, somewhere close to 30 years.

He testified he was on duty on the date in question. He was there alone because the other mechanics hadn't shown up yet. He heard over his radio that this particular flight was returning because of a pressurization problem. Therefore, he went out to the gate and met the aircraft at the gate, indicating he also called the ground crew and told them not to touch the aircraft until he got there.

On his testimony, he did a walk-around to assure that there were no hatches that were open on the aircraft, which, of course, would have resulted in the aircraft having difficulty pressurizing. He testified he found no open doors or hatches. He then entered the aircraft.

On entering the aircraft, according to him, he asked what had happened and got the response from the Captain that the aircraft would not pressurize. He indicated he -- Mr. Gregory--then asked if the aircraft would not pressurize in all three modes, because there are three modes: automatic, standby and manual, and the

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response that he got from the Captain, according to Mr. Gregory, was "yes;" that is, that the aircraft wouldn't pressurize in all three modes.

According to Mr. Gregory, he then looked at the P-6 panel, and at that time observed that all six circuit breakers were -- that is, the circuit breakers for all three modes were in the open position, and he informed the Captain of this, and at that time, according to Mr. Gregory, the Captain replied, "Oh, shit."

The corrective action, according to Mr. Gregory, was that he simply reset the circuit breakers. He then selected or ran through all three modes, and to his observation, the system operated normally. He went on to state that he was aware of no problems with the pressurization system in this particular aircraft.

With respect to what he had observed over the course of his career, he stated he had never seen, not merely heard but had never seen, an aircraft where all six circuit breakers had popped at one time. He stated that all three systems are in fact independent from one another, and they do not operate in conjunction with one another; that is, if something happened with one system, that would not affect the other system because they are in fact independent systems. There's no

testimony to contradict that.

Lastly, he also responded with whether or not he had ever heard of something like this, and he said actually it was never within his experience,nor had he ever heard of an incident where all six circuit breakers had opened or popped without requiring any maintenance on the aircraft pressurization system.

Mr. Morris has a background in mechanical engineering. He's also an aerospace engineer holding a Master's degree apparently in that and has another history of operations within aircraft systems with apparently a specialization in pressurization systems, doing that both for industry and for the Air Force, and in particular having on-the-job training with Boeing, that is on site, with pressurization. He is in the evaluation program for pressurization systems with the Federal Aviation Administration.

He stated he was familiar particularly with 737-200 pressurization systems and the circuit breakers thereof. Admittedly, he is not an electronics engineer. However, he does have the background as I've already stated it.

He stated that on his experience, he had never come across an incident where all six circuit breakers had popped simultaneously, that is at the same

time, and limited to one system. He indicated there were at least five different power sources that go into the one control.

He also testified in rebuttal, and I include that testimony here. On rebuttal, he stated that having heard all of the testimony offered by the Respondents in their case-in-chief, that he was still firmly of the opinion that all six circuit breakers would not pop simultaneously with any problem with any one of the particular systems.

With respect to the program management system, he stated that the circuit breakers in question, that is, the pressurization control circuit breakers, are only connected to the pressurization system. In fact, that's what they're called, pressurization controls, and there is no direct connection to the program management system, no direct contradiction of that.

Captain Richard testified on his own behalf. He, of course, has a long experience in aviation, also. 20 years with the United States Air Force flying B-52s and B-1 bombers. He is also a line check pilot. He's been a captain with Frontier since, I believe, May of 1995, and he does initial operations training, also.

He was unclear whether this flight in

question was his first opportunity to fly with First Officer Hillman. First Officer Hillman, of course, indicated it was maybe the second time. So, it was either the first or second time that the two individuals had operated as a crew.

With respect to the circuit breakers, he indicated and testified that he believed he had checked them, but he couldn't say that he in fact had "eyeballed" all of the circuit breakers, and he wasn't sure whether or not at the time that the circuit breakers were checked, at least when he eyeballed some of them, whether the aircraft was on an APU system or not. He did go on to state that when the aircraft does switch over from the APU to the engine generators, that there is, of course, an alteration in the electrical current as one switches from one system to the other.

In his view, summarizing it, both he and the First Officer correctly ran both the pre-flight and the before-starting checklist. He felt that he had a right to rely upon his First Officer, and that through his reliance on the First Officer, the six circuit breakers were in fact set in the correct position prior to their departure from Denver.

First Officer Hillman testified, also. He's been with Frontier since March of 1997. He was on a

two-day schedule on this particular flight in question. He, of course, has prior aviation experience, also.

With respect to the checking of this aircraft prior to departure, Mr. Hillman testified that when he got into the cockpit area, the flight deck, that the oxygen mask was apparently on the cockpit floor, down behind his seat, because he couldn't even get his brain bag over off to the right-hand side of his seat, and that when he went down to pick up the 02 mask, he also, therefore, was at apparently close to eye level with the pressurization control circuit breakers. On his testimony, all six circuit breakers, when he looked at them, were in the on position.

Mr. Stucka is a mechanic with Frontier Airlines. He was in a taxi and run-up certification training on the date in question, and in fact, he and a supervisor actually moved this aircraft from the hangar apparently over to the gate where it sat for a period of time until this particular flight had departed, which was about 3 in the afternoon.

He stated that when they were moving the aircraft, that he, Mr. Stucka, was in the left seat, and that a checklist was run, and he couldn't remember whether he or the supervisor actually ran the checklist, but he did indicate that it was used.

With respect to the checklist, when we established that as Respondent's Exhibit 4, the circuit breakers as listed on that checklist, the circuit breakers as required. Mr. Stucka was never, according to my notes, clear as to what circuit breakers he actually was checking, according to that checklist, because it says only "circuit breakers as required."

Mr. Wyche testified on behalf of the Respondents. He's the Executive Vice President of Operations. He stated that he has had circuit breakers pop on aircraft. Certainly anyone that has been flying for any amount of time and probably at one time or another had a circuit breaker or more than one pop with an aircraft. However, his testimony was not that he's experienced six circuit breakers in the pressurization system of a 737 popped, but he was of the view that the crew did follow the policies and procedures as outlined by the requirements of Frontier Airlines.

Mr. Brian Durbin is a First Officer with Frontier. He also is an instructor pilot, a trainer both for pilots and apparently dispatchers and possibly others. He testified also with respect to the policies and procedures and use of the pre-flight and the before-start checklist and opined that the crew, based upon what he heard of the testimony, had in fact

followed those policies and procedures and properly executed their pilot duties.

That to me is the pertinent evidence in the case. This case is a circumstantial case. It is also a credibility case. I would agree with that formalization of the presentation of this particular case.

In a circumstantial case, in my view, this case falls under the Limstand Doctrine as enunciated by the Safety Board; that is, that once the Administrator shows in a particular case that operation does not normally occur absent some force or item being in an abnormal condition, that is possibly wind, something wrong with the vertical stabilizer, to stay away from this, that that is sufficient to make a prima facie case and shift the burden of going forward with an explanation to explain what was found with the particular incident. This is similar to a res ipsa locutor situation.

Here, this aircraft, a 737-200, normally operates with all six circuit breakers in the in position. On the return to Denver, disputedly it was found all six circuit breakers were in the open position. That is not the normal position.

Therefore, in my view, it was incumbent upon

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the Respondents to furnish some reasonable explanation as to what would have caused all six circuit breakers to open simultaneously.

The evidence in front of me, the testimony of Mr. Gregory is that he has never in his experience had an incident where all six circuit breakers would pop at one time, and as I understood his testimony, that because they are three independent systems, that a malfunction in one of the systems would not affect the other two. That is, you have three independent systems.

He further stated that in his 38 years, he had never experienced such himself and in fact had never heard of it, that is, all six circuit breakers, without some maintenance problem having occurred, and, of course, in the evidence here, there was no maintenance done to this aircraft with respect to the pressurization system, either before or subsequent to this particular incident.

The objective evidence is, of course, the circuit breakers were found in the open position, and that Mr. Gregory, after getting on the flight deck and having a conversation with the captain, simply reset the circuit breakers, and the aircraft, on the evidence, operated normally for the remainder of that

schedule and for the subsequent days.

So, there is no evidence of any type of electrical or mechanical malfunction with any system on this aircraft which would account for all six circuit breakers being in the open position. Therefore, under the Limstand doctrine, I have six open circuit breakers which is the objective evidence, and nothing to explain how all six circuit breakers could in fact go into the open position and then have nothing as an explanation or replication of that event occurring either before or after with this particular aircraft.

Turning then as to the reliance which I think is really what Respondent was getting to, the checklist calls for the crew to do the item. The checklist says this is a crew function. It doesn't mean that only one individual has the responsibility. One person can do the check, and the other one has to call it out, but there is a crew responsibility under the checklist for the before-start.

It's clear from the checklist itself that the items are delineated with respect to the ultimate responsibility as captain, first officer, crew, or either or. This is a CR item.

The Board in the case of Administrator v. ~~Ragan~~ Raye and Takes discussed the criteria for establishing

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a case of reasonable reliance. One must be there is no duty imposed upon the pilot raising the issue of reasonable reliance. Here, the checklist calls for crew involvement. That's the entire crew.

Also under 91.3, the captain is ultimately responsible for the safe operation of the aircraft. He may delegate. However, he cannot delegate the responsibility.

Further, as enunciated in the case of Fagan v. Takes, there must, for reasonable reliance, be no ability on the part of the individual to ascertain the information for himself. Here, the Captain certainly could have looked at the panel himself. There's no indication that the panel is not readily observable by him.

In my view, this was a crew responsibility to assure that these circuit breakers were in fact set, all circuit breakers, but particularly on this checklist, the circuit breakers and radio switches, but it says circuit breakers. So, it's not just check yours but to assure that all circuit breakers for this aircraft were properly set.

I therefore, on the evidence in front of me and precedent, do not find that there is a case of reasonable reliance made.

With respect to the incident itself, as I've indicated, I view this as a res ipsa or Limstand case. The objective evidence is what I must look at. The objective evidence is that the circuit breakers were found in the open position when the aircraft returned to Denver. The testimony of the Respondent and the Captain are that the circuit breakers were in fact in, particularly Mr. Hillman's testimony that he observed that when he pick up the oxygen mask. But there has been no offer of any reliable explanation as to how all six circuit breakers which are independent three systems would pop at the same time and then could be reset, and the entire system apparently operate normally thereafter.

That being the case, it appears to me that the more reliable and probative evidence is simply that for whatever reason, that checklist item was not accomplished or not accomplished correctly or maybe simply overlooked. But in any event, the evidence by a clear preponderance shows that the pressurization circuit breakers were found in the open position upon the aircraft's return to Denver, that the circuit breakers were simply reset, that the system operated correctly thereafter, not only on that flight but on subsequent days, and that there is no indication of any

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system check or system maintenance as would account for all six circuit breakers going from their properly-set position to the open position simply during the course of this take-off.

I therefore find that the preponderance of the reliable, credible and probative evidence does establish that the Respondents as a crew failed to follow the approved cockpit check procedures when operating said aircraft as a crew, and therefore each of them did operate in regulatory violation of Section 121.315(c) of the Federal Aviation Regulations.

With respect to sanction, the penalty, as I've indicated, has been waived with respect to both Respondents, and therefore there's no necessity to discuss any penalty or sanction.

Therefore, upon the consideration of the record in its entirety and appropriate precedent, I would affirm both Orders of Suspension as issued.

IT IS THEREFORE ORDERED THAT, the respective Orders of Suspension with Waiver of Penalty, the respective Complaints herein, be, and the same hereby are affirmed as issued.

Entered this 25th day of August 1998 at Denver, Colorado.

Patrick G. Geraghty
Judge

edited 9/1/98

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SERVED: June 24, 1999

NTSB Order No. EA-4775

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 24th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. JOHN L. DRANKO, Respondent.	Docket SE-15432

ORDER DENYING RECONSIDERATION

On consideration of the respondent's motion for reconsideration[1] of Board Order EA-4763 (served May 10, 1999) and the Administrator's response in opposition, we have concluded that the motion neither establishes error in our original decision nor otherwise presents a valid basis for reconsidering the judgment that respondent's appeal was properly dismissed for his failure to file a timely notice of appeal.

[1]Respondent's "Motion to Dismiss Order Dismissing Appeal" has been construed for purposes of this order as a request for reconsideration under Section 821.50.

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ACCORDINGLY, IT IS ORDERED THAT:

Respondent's motion for reconsideration is denied.

Daniel D. Campbell
General Counsel

SERVED: June 24, 1999

NTSB Order No. EA-4777

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 24th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. MICHAEL J. GEARIN, Respondent.	Docket SE-15323

ORDER DISMISSING APPEAL

The Administrator has moved to dismiss the appeal filed by the respondent in this proceeding because it was not perfected by the filing of a timely appeal brief, as required by Section 821.48(a) of the Board's Rules of Practice (49 CFR Part 821).[1]

[1]Section 821.48(a) provides as follows:

§ 821.48(a) **Briefs and oral argument.**

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

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We will grant the motion, to which respondent filed no response.

The record establishes that respondent filed a timely notice of appeal from the oral initial decision the law judge rendered on February 23, 1999,[2] but he did not file an appeal brief within 50 days after that date; that is, by April 14, and he has not to date filed an appeal brief.[3]

In the absence of good cause for respondent's failure to perfect his appeal by filing a timely appeal brief, dismissal of his appeal is required by Board precedent. See Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted; and

2. The respondent's appeal is dismissed.

Daniel D. Campbell
General Counsel

[2]The law judge affirmed, in part, an order of the Administrator suspending any pilot certificate held by respondent, including Airline Transport Pilot Certificate No. 021447191, for his alleged violations of sections 91.119(a) and (d) and 91.13(a) of the Federal Aviation Regulations, 14 CFR Part 91. The law judge dismissed the section 91.119(d) charge and, for that reason, reduced the suspension sought by the Administrator from 120 to 90 days.

[3]The record reflects that respondent had previously been furnished a copy of the Board's Rules of Practice.

SERVED: June 24, 1999

NTSB Order No. EA-4776

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Issued under delegated authority (49 C.F.R. 800.24)
on the 24th day of June, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. LOUIS RIDGE DUSKIN, Respondent.	)	Docket SE-15399

ORDER DISMISSING APPEAL

The Administrator has moved to dismiss the appeal filed by the respondent in this proceeding because it was not perfected by the filing of a timely appeal brief, as required by Section 821.48(a) of the Board's Rules of Practice (49 CFR Part 821).[1]

[1]Section 821.48(a) provides as follows:

§ 821.48(a) **Briefs and oral argument.**

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

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We will grant the motion, to which respondent filed no response.

The record establishes that respondent filed a timely notice of appeal from the oral initial decision the law judge rendered on March 24, 1999,[2] but he did not file an appeal brief within 50 days after that date; that is, by May 13, and he has not to date filed an appeal brief.[3]

In the absence of good cause for respondent's failure to perfect his appeal by filing a timely appeal brief, dismissal of his appeal is required by Board precedent. See Administrator v. Hooper, 6 NTSB 559 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted; and

2. The respondent's appeal is dismissed.

for Daniel D. Campbell
General Counsel

[2]The law judge affirmed an order of the Administrator revoking any airman pilot certificate held by respondent, including Private Pilot Certificate No. 548722193, for his alleged violations of sections 61.3(c), 61.23(a)(3)(i), 67.403(a)(1) or, in the alternative, 67.403(c)(1), 91,203(a)(1), and 91.13(a) of the Federal Aviation Regulations, 14 CFR Parts 61, 67 and 91.

[3]The record reflects that respondent had previously been furnished a copy of the Board's Rules of Practice.

INITIAL DECISIONS

FOR THE MONTH OF

JUNE 1999

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY, Administrator
Federal Aviation Administration,

Complainant

v.

JOHN RICHARD DUNN,

Respondent

Docket No. SE-15606

NTSB Courtroom
624 Six Flags Drive, Suite 150
Arlington, Texas

Wednesday,
June 2, 1999

The above-entitled matter came on for hearing, pursuant to Notice, at 9:50 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

For the Complainant:

JOHN J. CALLAHAN, Attorney
Federal Aviation Administration
Office of Assistant Chief Counsel
1601 Lind Avenue S.W.
Renton, Washington 98055
(425) 227-2007

For the Respondent:

JIM LANE, Attorney
204 W. Central Avenue
Fort Worth, Texas 76106
(817 625-5581

(123)

ORAL INITIAL DECISION AND ORDER

JUDGE MULLINS: We'll go on the record at this time.

This has been a proceeding before the National Transportation Safety Board and the matter has come on for hearing on the appeal of John Richard Dunn from an Emergency Order of Revocation that has revoked his airframe and powerplant certificate or mechanic's certificate with those ratings.

The Order of Revocation serves as a complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through regional counsel of the Northwest Mountain Region in Renton, Washington.

The matter has been heard before me, William R. Mullins. I'm an Administrative Law Judge, and as is required by the Board's rules in emergency cases, I will issue a decision here today.

The matter came on for hearing pursuant to notice to the parties here in Arlington, Texas, this 2nd day of June of 1999.

The Administrator was represented throughout this proceeding by Mr. John Callahan, Esquire, of the Regional Counsel's Office of the Northwest Mountain Region, Renton, Washington; and the Respondent was present

at all times and was represented by Mr. Jim Lane, Esquire, of Fort Worth.

The parties were afforded a full opportunity to offer evidence, to call, examine and cross examine witnesses. In addition, the parties were granted an opportunity to make argument in support of their respective positions.

DISCUSSION

JUDGE MULLINS: As I stated previously, the matter was on for hearing on an Emergency Order of Revocation that has revoked Mr. Dunn's A&P certificate.

The Emergency Order of Revocation alleges a regulatory violation of FAR 43.12(a)(1). The principal portion of the Emergency Order of Revocation has six paragraphs. The first five were admitted by the Respondent.

And those paragraphs are: Paragraph 1, "At all times material hereto you were and are the holder of mechanic's certificate number 548061807, with airframe and powerplant ratings." That was admitted.

Paragraph 2, "On or about March 11th, 1998, you performed maintenance on civil aircraft November 515LG, an Israel Aircraft Industries IA-1124, and approved said aircraft for return to service." That was admitted.

Paragraph 3, "You made the following entry in

the maintenance records of November 515LG, '(C/W 3-year T/R cable lube.'" And that was admitted.

Paragraph 4, "At the time you made the entries referred to in Paragraph 3 the aircraft maintenance manual required the lubrication of the throttle retarder feedback cable at intervals not to exceed three years." That was admitted.

Paragraph 5, "Your entry in the aircraft maintenance records as described in paragraph 3 signifies that you had performed the required lubrication of the throttle retarder feedback cable." That was admitted.

Paragraph 6, "The entry was fraudulent or intentionally false in that you did not lubricate the throttle retarder feedback cable," and that has been denied.

And as a result of those allegations, the Administrator has alleged the regulatory violation of FAR 43.12(a)(1) and has revoked the certificate.

The Administrator had eight exhibits. I don't need to go through all of the exhibits because the logbook entry was admitted.

Much of the evidence was admitted, as I've just indicated. However, the primary focus of the Administrator's case here is that the access panels, which was undisputed must be removed to perform the maintenance

described in the logbook entry, had not been removed.

The allegation was that the maintenance was performed in 1998. The aircraft was painted in 1996. The photographs, which would indicate and show those access panels, and specifically the one panel which is the second photograph in Exhibit C-4 and the second photograph in C-4(a), which are copies of those photographs, shows that not only does it appear that the access door had not been removed since there had been paint, but it also reflects that there were three different colors of paint, because one of the letters in the tail number of the aircraft extended down through that access panel.

The Administrator called three witnesses. The first was Mr. Brown, who is the chief pilot of Label Graphics, the company that owns the aircraft, and he had been the chief pilot some time prior to any of this contact with the Respondent.

And Mr. Brown testified that the aircraft had been painted prior to bringing the aircraft down to Fort Worth to have the work done by Mr. Dunn, and he also testified that no one else had been authorized to paint nor had they ever been charged for any painting that was done since that time.

The second witness called by the Administrator was Mr. Karren. Mr. Karren works for Aero Air, Inc., that

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was in existence up to approximately sometime early last year, and then they were replaced by Aero Air, L.L.C., and they're located in the Portland area, and they are apparently the certificated repair station that does most of the work on this particular aircraft.

But Mr. Karren testified that when they were doing some work in February, they discovered these access panels had not been removed and he contacted Mr. Baas, who is the principal maintenance inspector for that certificated repair station, and Mr. Baas was the third witness called by the Administrator.

Mr. Karren admitted on cross examination that they had performed, his company, Aero Air or Aero Air, Inc., I guess it was Aero Air, Inc., had performed an A check sometime last year, which required the removal of those panels and that work was done subsequent to the time alleged that Mr. Dunn, the Respondent, did his work, but that the access panels were not removed during the A check.

It was determined from his testimony and the testimony of others that there was no certificate action going on against Mr. Karren or Aero Air, Incorporated, because Aero Air, Incorporated, evaporated and became Aero Air, L.L.C.

So that the repair station, as was indicated by

the Administrator, that existed at the time this A check was done when those doors should have been removed no longer exists.

Mr. Baas was called to testify. He's an aviation safety inspector and he testified that he was the principal maintenance inspector for Aero Air, Inc. for 12 years and now has been the principal maintenance inspector for Aero Air, L.L.C. for the last year since they've been in existence.

He said that he was called by Mr. Karren. He went out the day afterwards. He was told that all four of the access doors, and there's two on each engine, had been painted and had not been removed since the date of the painting.

But when he arrived the next day, there was only one door that remained intact, but that was the door on the left engine, which is reflected in the second photo of C-4 and the second photo of C-4(a).

His testimony was that it had not been touched up, that this was an original paint scheme; and particularly with the letters down the way they were, that there was no way that there could have been a touchup.

He said it would have been extremely difficult and he didn't believe there was a touchup. Mr. Karren testified he had some experience and time working on

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aircraft; that he didn't believe it had been touched up.

Mr. Dunn then was called. Mr. Dunn said that he had been in the aviation business for twenty-two-and-a-half years. He company, Trimec, that he owns with a couple of other people, specializes in Westwind aircraft, which this one was.

And he testified that he did not touch up these panels, but that he did remove them and that he had done the work.

There are several exhibits and I don't think it's necessary to go through all of the exhibits. Respondent's Counsel has raised the issue about the credibility of Mr. Karren and Mr. Baas because of this work that they were supposed to have done and that they not only now admit they didn't do it but there has not been any action taken against those folks.

In that regard, I would simply say this. All of the repair stations that I have had hearings against, that I have seen and have had problems with, and you can take this for whatever it's worth, Mr. Baas, but any time a principal maintenance inspector has been hanging around for more than five years, there's usually some problems start coming up.

And when that guy goes on his way and the next guy comes in, there's usually all kind of, if you'll

pardon the expression, hell to pay that often results. I don't know that that's the situation you've got up there, but I know that that's what it looks like to this Respondent, because you've come in and you've asked to put him out of business and your folks that you've been dealing with for 13 years are skating on a logbook entry that looks just as bad as the one that Mr. Dunn made.

You can call it what you like, but if they said the access doors were removed and they did an inspection and they weren't, then they are just as guilty, and I don't care how you change the name of the corporation and the kind of little corporate little deals you pull, it's still the same folks out there, the same Mr. Karren that did the work.

So I have a concern as a Judge and I know the Safety Board has a concern, not only of safety but also of appearance of fairness in these proceedings, and I know that that's Mr. Dunn's perspective of this case, because those folks up there are obviously skating on this thing and you're here against this case with Mr. Dunn.

Just because they are guilty doesn't mean necessarily that he wasn't, but at the same time, if you could just for a second, and tell Mr. Karren this, if you could put yourself in Mr. Dunn's shoes, how obvious that must look to him.

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But the bottom line here is that Mr. Dunn says he did the work. He says he did -- He admits he did the logbook entry.

The testimony of Mr. Brown would indicate that there hasn't been any painting done to that aircraft. The photographs, it would appear there hasn't been any painting done to that, no touchup, airbrush or any of that.

And then the testimony of both Mr. Baas and Mr. Karren, which is supported obliquely, I suppose, by Mr. Brown's testimony, would indicate that those panels were not removed.

Since that is established by a preponderance of the evidence, and preponderance simply means that evidence which seems more probably true than not true, then I think it follows that I must find that Mr. Dunn is in regulatory violation as alleged and the Emergency Order of Revocation will be affirmed.

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ORDER

JUDGE MULLINS: It is therefore ordered that safety in air commerce and safety in air transportation requires an affirmation of the Administrator's Emergency Order of Revocation as issued; and specifically, as I have discussed it previously on this record, a preponderance of the evidence has established that Mr. Dunn, the Respondent, was in regulatory violation as alleged, and therefore the order is affirmed.

William R. Mullins,

Administrative Law Judge

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JUDGE MULLINS: Mr. Dunn, Mr. Lane, Mr. Dunn has the right to appeal this order and a Notice of Appeal must be filed with the National Transportation Safety Board within two days of this date, and then within five days after that date a brief must be submitted.

You will receive a transcript of this proceeding, but probably not before the five days is up. So I suppose that's a bit of a dilemma.

But Mr. Lane, if you'd step up, I'll hand you a copy of this Rights to Appeal, and it has the office where the appeal needs to go, our office in Washington, and then also the General Counsel's office in Washington where the brief is required to be submitted.

MR. CALLAHAN: And also copies to the FAA; is that correct?

JUDGE MULLINS: Yes, and copies to be sent to the FAA, and that's specified in that order.

Mr. Lane, do you have any question about the Order today?

MR. LANE: Not at all.

JUDGE MULLINS: Does the Administrator?

MR. CALLAHAN: No, Your Honor.

JUDGE MULLINS: All right. Thank you, gentlemen. The hearing is terminated.

[At 3:14 p.m., the hearing was closed.]

CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and Order which was signed and edited on June 14, 1999, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 14th day of June 1999.

ANNE SMITH
Paralegal Spec/Hearings Asst.
Circuit IV, WILLIAM R. MULLINS
Administrative Law Judge
Arlington, Texas

JOHN RICHARD DUNN
SE-15606

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Served: June 3, 1999

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket No. SE-15261

KLAUS MARX,

Respondent.

WRITTEN INITIAL DECISION

Service: *Cheryl Jones, Esq.*
FAA Alaskan Region
222 West 7th Avenue, Box 14
Anchorage, AK 99512-7587
(Served by fax and priority mail)

Klaus Marx
1245 Mendenhall Peninsula Road
Juneau, AK 99801
(Served by certified mail)

This is a proceeding under the provisions of 49 U.S.C. § 44709 (formerly § 609 of the Federal Aviation Act) and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board. Klaus Marx, the Respondent, has appealed the Administrator's Order of Suspension, dated May 4, 1998, which, pursuant to §821.31(a) of the Board's Rules, serves as the complaint,[1] in which the

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[1] The complaint alleges as follows:
1. You are now, and at all times hereinafter mentioned were, the holder of Airman Mechanic Certificate No. 206529136 with airframe and powerplant privileges.
2. On or about August 12, 1997, you performed a 100-hour inspection of Civil Aircraft N1682C, a Cessna Model 180-180, determined, and certified that aircraft to be in airworthy condition.
3. At the time of your inspection, you also indicated in the logbook and maintenance records for Civil Aircraft N1682C that you accomplished Airworthiness Directive (AD) 87-20-03 R2, which requires inspection of the seat rails and set peg for condition and operation.
4. On September 2, 1997, Civil aircraft N1682C was inspected by Brian Iorg, an Aviation Safety Inspector assigned to the Juneau Flight Standards District Office. At the time of this inspection, the pilot's seat track forward most hole was broken out. The condition of the pilot seat rails was beyond the limits acceptable under AD 87-20-03 R2.
5. As a result of the discrepancies noted in paragraph 4, Civil Aircraft N1682C was unairworthy.
6. The discrepancies noted in paragraph 4 existed at the time of your 100-hour inspection and the aircraft was in an unairworthy condition at the time of your inspection.
7. As a result of the above, you failed to perform the 100-hour inspection in such a manner as to determine whether Civil Aircraft N1682C complied with applicable airworthiness requirements.

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Administrator ordered the suspension of any mechanic certificate held by him, including his Airman Mechanic Certificate No. 206529136, for 60 days, for alleged violations of §§ 43.9(a), 43.13(a) and (b), and 43.15(a) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.).

In his answer to the complaint, the Respondent admits that he is the holder of Airman Mechanic Certificate No. 206529136, with airframe and powerplant privileges; that he completed a 100-hour inspection on Civil Aircraft N1682C on or about August 12, 1997; and that he followed the inspection instructions of Airworthiness Directive ("AD") 87-20-03 R2, and determined that the seat tracks conformed to the requirements of the AD.

I

N1682C, a Cessna model CE-180 aircraft built in 1953, was involved in a ground loop incident on August 29, 1997, at the Hoona (Alaska) Airport, which resulted in damage to the landing gear of the aircraft. At the request of the National Transportation Safety Board, on September 2, 1997, two FAA aviation safety inspectors, airworthiness, Jeffrey S. Pritchard and Bryan Iorg, were dispatched to site of the incident to examine the aircraft. Inspector Pritchard prepared an Aircraft Incident Record, on which he recorded that the damage was minor. By that, he meant there was no structural damage.

N1682C was listed on the Operations Specifications of Frederick M. Jackson's air carrier certificate, authorizing interstate common carriage operations.

During the course of inspecting the aircraft, Inspectors Pritchard and Iorg found two conditions, unrelated to the ground loop damage, which they considered to be discrepancies.

First, they found that the forward-most hole in the crown of the left seat track for the pilot's seat exceeded the tolerances allowed in AD 87-20-03 R2, which was

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8. On a date known to you, you altered the airframe of Civil Aircraft N1682C by installing a BAS, Inc. tail pull handle.
9. Although you performed this major alteration, you did not complete the FAA Form 337 certification certifying the alteration was made in accordance with the requirements of Part 43 and you did not approve the aircraft for return to service following the alteration.
Based on the foregoing facts and circumstances, you violated the following Federal Aviation Regulations:
(a) Section 43.9(a), in that you did not complete the FAA form 337 following your alteration of Civil Aircraft N1682C in the manner prescribed by Appendix B of Part 43.
(b) Section 43.15(a), in that you performed an inspection required by Part 91, 123, 125, or 135 and failed to perform it in such a manner as to determine whether the aircraft met all applicable airworthiness requirements.
(c) Section 43.13(a), in that you performed maintenance on an aircraft and did not use the methods, techniques, and practices prescribed in the manufacturer's maintenance manual or instructions for continued airworthiness prepared by the manufacturer, or other methods, techniques, and practices acceptable to the Administrator.
(d) Section 43.13(b), in that in maintaining or altering Civil Aircraft N1682C, you did not do that work in such a manner and use materials of such a quality that the condition of the aircraft or airframe was at least equal to its original or properly altered condition following your maintenance or alteration.

applicable to N1682C's model and serial number. The AD specified that if the dimension across any hole in the top of the seat track exceeded 0.42 inches, the seat track had to be replaced. For an aircraft operated for hire, such as N1682C, with the number of flight hours which N1682C had (3,700.5, as shown on its tachometer), the AD required inspection of the seat tracks every 100 hours, or every annual inspection.

The aircraft's maintenance log contains an entry for a 100-hour inspection, with a return of the aircraft to service as airworthy on August 12, 1997, signed by the Respondent. The inspection references compliance with AD 87-20-32 R2. The tachometer reading was 3,670.0 hours. The aircraft had been flown 30.5 hours between the time of the 100-hour inspection and the ground loop incident on August 29, 1997. The aircraft's maintenance records show that the Respondent had previously inspected the seat rails during annual or 100-hour inspections on April 13 and June 12, 1997.

As observed and photographed by Inspectors Pritchard and Iorg, the forward-most end of the flat upper crown of the left seat track, on which the seat rides, was missing, leaving only a semi-circular opening in the crown where there was supposed to be a hole in the metal. As there was no hole, or opening in the crown surrounded by metal, what remained of the original hole exceed the maximum allowable dimension of 0.42 inches, and, therefore, did not comply with the AD.

The pilot's seat is attached to seat tracks, upon which it rides on rollers. The seat is adjustable, and is held in place by a seat-locking mechanism which engages a vertical spring-loaded seat pin through one of a series of holes along the length of the left seat rail. By raising the pin out of the hole, the pilot can slide the seat back and forth on its rollers, and can adjust the seat to the optimum position for him to reach the aircraft's controls. When the pin is seated in a hole in track, the seat will not move. The design of the left seat track calls for a stop to be installed over, and blocking use of, the forward-most hole in the left seat track, so the seat will not slide off the track when the pin is raised to allow movement. The stop is attached by a horizontal pin which goes through a hole underneath the flat crown upon which the seat rides. Without the stop in place, and with only half the metal missing around what used to be hole, there was no stop and no hole in which to insert the locking pin, and, thus, nothing to prevent the seat from moving forward, off the track, if it was adjusted as far forward as possible. The possibility of an unexpected movement of the unsecured seat during operation of the aircraft, with the further possibility the pilot could lose control of the aircraft, is obvious.

Both Inspector Pritchard and Inspector Iorg testified that the forward part of the crown forming the forward half of the forward-most hole had not broken off or separated recently. They said the failure was the result of wear from the locking pin engaging and disengaging, but that the wear was not recent because there were no sharp ragged edges, indicating a sudden failure, and the broken or worn-away ends of the crown had oxidized to the same color as the rest of the rail, indicating a long passage of time since the damage had occurred.

Inspector Pritchard theorized that the edge of the forward hole had been worn away over a long period of time by the pin vibrating in the hole. Based on his metallurgical training in accident investigation courses, he thought the rail had been in that condition for in excess of 350 hours. He said the forward edge of the hole had not

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been torn away in the ground loop incident, because there were no jagged edges indicating a sudden failure and the remaining edges were worn and not sharp. According to Inspector Pritchard, the roundness of the remaining semi-circular hole's edges indicated it had been worn for a long time.

Inspector Iorg testified that the aircraft's owner had told him that he had acted in good faith, and had used the forward-most hole to fly. The Administrator did not call the owner as a witness, however, so there is little basis upon which to assess the owner's credibility. Inspector Iorg also testified that the Respondent said he was aware the seat tracks were worn, and planned to replace them after the summer season.

The Respondent testified that the owner of the aircraft had purchased it three months earlier, and that were problems with the aircraft because of aging. He said the owner made many short flights, which increased the wear on the aircraft. The Respondent stated that the first he knew of the damage to the left seat track was on September 2, 1997, when the inspectors showed it to him. He said that what he saw was structural damage. He said the seat stop was there when he conducted the 100-hour inspection on August 12, 1997, and that, otherwise, the track was still in the same condition. The Respondent offered a plausible-sounding explanation for how the crown could have broken off, through force exerted by improper seating of locking pin over the stop, causing the stop and a portion of the crown to beak away, but even accepting that explanation, it does not shed any light on when the damage to the left seat track occurred.

II

A determination as to the condition of the left seat track when the Respondent performed the 100-hour inspection is largely a credibility issue. There is no direct evidence as to how or when the seat track came to be in the condition it was in when the inspectors looked at it on September 2, 1997. There is, however, strong circumstantial evidence, in the form of the testimony of two experienced aviation safety inspectors, in whose judgment — based on training and experience — the damage could not have occurred since August 12, 1997, some 21 days earlier, when the 100-hour inspection was performed.

Having observed photographs of the damaged forward-most end of the seat track, I find it probable that part of the track was torn away by force, rather than worn away. Although wear could certainly be a factor, the forward-most hole had been blocked by a seat stop, and, therefore, was not used as a seat for the pin and would not be subject to wear from the pin vibrating in the hole as long as the seat stop was in place. On balance, I find it more likely than not that the damage was caused by an application of force which tore away the stop and, with it, the forward-most portion of the track.

Whether or not the damage was caused by force or wear, I find the inspectors to be more credible than the Respondent as to when the damage occurred. Both inspectors are highly experienced and trained in aircraft maintenance and investigation of damage and wear to aircraft. Both Inspector Pritchard and Inspector Iorg had training

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and experience in accident investigation, and Inspector Pritchard had attended classroom training on aging aircraft and corrosion. He has had experience in estimating when metal failed. Both inspectors examined the damaged seat track.

Among the most convincing factors cited by the inspectors indicating that the damage was not recent was the fact that the broken (or worn) ends and the remainder of the hole were smooth and rounded, and were not jagged, as would be characteristic of recently damaged metal. Further, the metal, in that area was not shiny, indicating recent wear or a recent break, but had weathered to the same gray color as the rest of the track. Finally, there was no debris on the floor under and around the seat, such as the missing forward part of the track and stop, or pieces of them, which could be reasonably expected if the damage had occurred as recently as within the preceding three weeks.

The inspectors had a full opportunity to examine the aircraft and the condition of the seat track. There is no evidence that either of them had any interest in the outcome of this case, or bore any animosity towards the Respondent. I observed their demeanor during the hearing, and I find them to be disinterested and credible witnesses. Therefore, I credit their testimony that the damage had not occurred as recently as within the three weeks since the Respondent had conducted his 100-hour inspection.

The Respondent was not a convincing witness when he testified that the seat track was intact when he had inspected it three weeks earlier. He made a broad statement that it was intact, but he offered no further explanation as to how he could have conducted a thorough examination of the seat track and still missed the damage. It seems clear that the entire track cannot be visually inspected at one time when the seat is installed. Depending upon where the seat happens to be positioned, only a portion of the track would be visible at any one time. The Respondent offered no explanation of what steps, if any, he took to inspect the entire length of the track, which appears to a requirement of the AD. On balance, I do not believe that he deliberately returned the aircraft to service knowing the forward part of the left track was not intact. If he had observed that it was damaged, it seems reasonable that he would have made the necessary repairs, and billed the owner for his work. Giving the Respondent the benefit of the doubt, it appears more likely that he made only a superficial inspection of the track, looking at the only the part that was the most readily visible, and missed seeing the part that was not intact.

The Respondent's failure to conduct a thorough inspection of all of the seat track, as required, violated FAR §§ 43.13(a) and (b), and 43.15(a).

III

The second discrepancy involved an incomplete Form 337, covering installation of a pull handle on the aircraft. While reviewing the aircraft's maintenance records, Inspector Pritchard found a Form 337 covering installation of a BAS pull handle, in accordance with FAA Supplemental Type Certificate ("STC") Number SA3812NM, which bore the Respondent's printed name, address, and certificate number, but lacked his signature in Blocks 6 and 7, certifying that the repair and/or alteration had been made in

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accordance with Part 43, and that the aircraft was approved for return to service. Installation of the handle pursuant to the STC requires that the mechanic complete a Form 337 showing the installation, and sign the certification returning the aircraft to service as airworthy. The completed Form 337 is to be submitted to the FAA for review within 48 hours. That was not accomplished by the Respondent. The installation must be recorded in a logbook entry and the aircraft returned to service, but Inspector Pritchard found no entry in the aircraft's maintenance logbook covering installation of the pull handle.

The inspectors found that, although the pull handle had been installed, Blocks 6 and 7 of the Form 337 with the return to service had not been signed, and there was no entry in the aircraft's logbook or maintenance records covering the installation. Therefore, the inspectors testified, the installation did not conform to FAR § 43.13, and the aircraft was not airworthy because it did not meet its type design. It does not appear from the record, however, that the inspectors questioned the Respondent about the incomplete Form 337.

Photographs of the aircraft taken by Inspector Pritchard on September 2 or 3, 1997, clearly show the installed pull handle. Inspector Pritchard testified that the owner told him that the handle had been installed early in the 1997 flying season, after his April 1997 purchase of the aircraft. He said he had operated the aircraft during the entire flying season with the handle installed. The owner was not called as a witness, however, and there is little basis on which the assess his credibility.

A week before the hearing, the inspectors received a maintenance record entry for installation of the pull handle. The flight hours flown by the aircraft recorded in the entry were 3753.2.[2] There is an FAA ISIS Inspection Report, dated on or about April 1 or 2, 1998, extracted from the FAA's computer records for N1682C, reporting installation of a BAS, Inc., pull handle by the Respondent, with his certificate number. The records do not provide a date for the installation.

The Respondent testified that he had installed the pull handle the morning after the ground loop accident on August 29, 1997. He said he had typed out the Form 337 and had intended to sign it when he returned the aircraft to service. He said he had thought he was going to get the job of repairing the damage to the landing gear, but the owner found someone in Anchorage who would do the work cheaper, and took the aircraft to him. The Respondent stated that he signed the Form 337 after the owner returned from Anchorage, as soon as he realized it had not been taken care of. He said he did not know how many hours the aircraft had been operated in the interim. The Respondent, in fact, contends that, if the inspectors had mentioned the incomplete Form 337 to him on September 2 or 3, 1997, when they were at the Hoonan Airport inspecting N1682C after the ground loop incident, he would have signed the Form 337 then and made the necessary maintenance logbook entry.

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[2] On April 1, 1999, the FAA received a copy of a maintenance record dated sometime in 1998 (the month is not legible, but the date appears to be the 31st), stating that at tach and total time 3753.2, a Form 337 was submitted for the BAS tail pull handle. The tach time shown on the aircraft at the time the two FAA inspectors observed it on or about August 2, 1997, was 3701.5 hours.

In rebuttal, Inspector Iorg identified a brochure for Tyme Air, with a color picture of the owner and N1682C on the front. The pull handle on the left side of the fuselage is identifiable in the photograph. An invoice for printing 2,200 copies of the brochure is dated January 2, 1998. The photograph appears to have been taken during the summer months, and Inspector Iorg said the aircraft in the photograph had the same tires on it as when he examined it on about September 2, 1997, after the ground loop incident had taken place. He said that, as shown in the photograph, the aircraft's belly skin was unwrinkled, but that, when he viewed the aircraft after the ground loop incident, wrinkled belly skin was part of the damage the aircraft had sustained in that incident. From the photograph, Inspector Iorg concluded the photograph of the aircraft on the brochure, with the pull handle installed, had been taken some time in the summer of 1997, but, in any event, prior to the August 29, 1997, ground loop incident.

The question of when the pull handle was installed by the Respondent also turns on credibility. As before, I find that the two inspectors were credible witnesses, who had no reason or motive to fabricate their testimony. However, the evidence produced by the Administrator, particularly in the form of the color photograph on the brochure for Tyme Air, is circumstantial. The one person whose testimony would appear to be relevant as to the timing of the installation of the pull handle is the owner of aircraft and Tyme Air. However, he was not called as a witness by either side, nor was there any evidence offered indicating that for some reason he was not available as a witness.

The brochure photograph is strong circumstantial evidence that the pull handle was installed sometime prior to the ground loop incident. Even in the absence of direct evidence as to when the photograph was taken, it appears from the photograph, which seems to have been taken some time during the summer, that the photograph was taken prior to the ground loop incident, because it does not show damage to the aircraft that resulted from the ground loop. I find this evidence strong enough to rebut the Respondent's claim that the pull handle was installed only after the ground loop incident of August 29, 1997.

I find the Respondent is not a credible witness in his testimony that he installed the pull handle on August 30, 1997, the day after the ground loop incident occurred, and typed, but forgot to sign, the Form 337, and make a logbook entry before the owner took the aircraft to Anchorage for repair of the damage resulting from the ground loop. I had the opportunity to observe his demeanor as a witness, and I found he gave the appearance of being evasive and imprecise in his testimony. In any event, by allowing the aircraft to be taken from his shop and flown to Anchorage for repair of the ground loop damage without completion of the Form 337 and the maintenance entry in the aircraft's logbook, the violation was complete, even if the pull handle was not installed until August 30, 1997.

On balance, although the evidence presented by the Administrator could have been more complete, I am satisfied that it is sufficiently strong to establish that it is more probable than not that the installation of the pull handle occurred prior to the August 29, 1997, ground loop incident. Although not conclusive by itself, the hearsay statement by the aircraft's owner that the pull handle was installed early in the 1997 flying season is corroborated by the circumstantial evidence produced by the Administrator. In any event, whenever the Respondent installed the pull handle, he did not complete the Form

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337 or make the required logbook entry before releasing the aircraft to its owner, or after it had suffered damage in the ground loop incident, so it could be taken elsewhere for repairs. His failure to complete and forward to the FAA a properly completed Form 337 and make appropriate entries in the aircraft's maintenance records violated FAR § 43.9(a) .

From the fact that Respondent did prepare a Form 337, although he did not complete it, I conclude that his failure to complete and forward the form, and to make appropriate entries in the aircraft's maintenance records, was the result of a negligent oversight, rather than a deliberate attempt to deceive the FAA.

IV

The remaining issue is the appropriateness of the sanction of a 60-day suspension of any airman mechanic certificate held by the Respondent, including Airman Mechanic Certificate No. 206529136, as ordered by the Administrator. The Respondent's violations essentially involve performing an inadequate 100-hour inspection and poor record keeping. There is no evidence of a pattern of such offenses, or intentional falsification, as matters in aggravation. The sanction ordered by the Administrator appears to fall in the middle of the range of sanctions for the violations found here. *Administrator v. Brown,* NTSB Order EA-4589 (1997). In the absence of substantial mitigating factors, I find the sanction ordered by the Administrator to be appropriate, and not inconsistent with Board precedent.

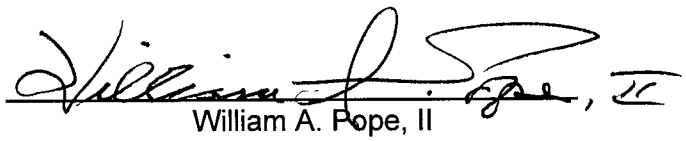
Thus, upon consideration of all of the substantial, reliable, and probative evidence of record, I find that the Administrator has proven by a preponderance of the evidence that Respondent violated FAR §§ 43.9(a), 43.13(a) and (b), and 43.15(a), as alleged in the complaint.

Accordingly, it is hereby ORDERED that:

1. The Administrator's order is affirmed; and

2. The Respondent's appeal is denied.

Entered this 3rd of June, 1999, at Washington, D.C.



William A. Pope, II
Judge

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APPEAL

Any party to this proceeding may appeal this initial decision by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and 3 copies of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of the other party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and 3 copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on the other party.

An original and 3 copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

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Served: June 3, 1999

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket No. CP-68

KURT M. LEPPING,

Respondent.

WRITTEN INITIAL DECISION

Service: *Glenn H. Brown, Esq.*
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This is a proceeding under the provisions of 49 U.S.C. § 44709 (formerly § 609 of the Federal Aviation Act) and the provisions of the Board's Rules of Practice in Air Safety Proceedings. Kurt M. Lepping, the Respondent, has appealed the Administrator's Order of Assessment, dated June 28, 1998, which, pursuant to § 821.31(a) of the Board's Rules, serves as the complaint,[1] in which the Administrator

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[1] The Administrator's complaint states that:

1. You are now, and at all times mentioned herein you were, the holder of Airman Pilot Certificate No. 53268302 with commercial pilot privileges.

2. On or about August 23, 1997, you served as pilot in command of civil aircraft N35962, a Cessna Model CE-U206F, on a flight which ended with a landing on Lake Lucille in Wasilla, Alaska.

3. While approaching Lake Lucille prior to landing on the above flight, you passed over Lake Lucille Lodge and persons outside the lodge attending a wedding reception.

4. You then descended to approximately 100 feet AGL and proceeded to the middle of Lake Lucille where you executed a 90 degree left turn.

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ordered the assessment of a civil penalty in the amount of $2,200.00, for alleged violations of §§ 91.13(a) and 91.119(c) of the Federal Aviation Regulations ("FAR, codified at 14 C.F.R.).

I

On August 23, 1997, the Respondent, as pilot in command of a Cessna 206 model seaplane, registration number N35926, made a water landing on Lake Lucille in Wasilla, Alaska. The complaint alleges that the Respondent, while eastbound at the center of the lake, made a 180 degree turn to the left, proceeded over the north shore of the lake, and then landed on Lake Lucille, coming closer than 500 feet to several houses when it was not necessary for a landing, because the landing on the lake could have been easily and safely accomplished without coming within 500 feet of any person, vessel, or structure.

The Administrator's case is based primarily on the testimony of Aviation Safety Inspector John O. Elgee, who lives in a lakefront home on the north shore of Lake Lucille. Lake Lucille is about two miles long, in an east-to-west direction, and about 2,000 feet wide, in a north-to-south direction, at the point where Inspector Elgee's home is located. One-quarter mile west of his property, on the north shore of the lake, is a hotel called the Lake Lucille Lodge. Photographs show that the lake's shoreline is quite heavily wooded, except where houses and other buildings have been built. The lakefront lots, including Inspector Elgee's, have 100 feet of lake frontage, and the homes are built 100 to 140 feet back from the shoreline. There is a house built on the adjoining lot to the east of Inspector's Elgee's lot, which is also 100-to-140 feet from the edge of lake. On that property, or next to it, is a wooded point of land which juts out sufficiently far into the lake to block the view of the east end of the lake from Inspector Elgee's dock.

Inspector Elgee is a pilot and the owner of a Cessna 206 seaplane, similar to N35926, the aircraft involved in this case, which he keeps tied to a dock at the front of his lot. His neighbor to the east also has a seaplane docked at the front of his lot. The City of Wasilla had placed round floats around the lake shore, about 100 feet offshore,

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5. While maintaining an altitude of approximately 100 feet AGL you proceeded eastbound at approximately the center of the lake and then executed a steep, 180 degree left turn near the trees and houses along the north shore of the lake.

6. You then proceeded along the north shore and then landed near Lake Lucille Lodge.

7. While executing the turn and proceeding over the north shore of the lake referenced in paragraphs 5 and 6, you came closer then 500 feet to several houses.

8. Coming within 500 feet of the houses referenced in paragraph 7 was not necessary for landing because a landing on Lake Lucille could easily and safely have been accomplished without coming within 500 feet of any person, vessel, vehicle, or structure.

9. Your operation of civil aircraft N35962 as described above was careless or reckless so as to endanger the life or property of another.

Based on the foregoing facts and circumstances, you violated the following Federal Aviation Regulations:

(a) Section 91.13(a) in that you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.

(b) Section 91.119(c) in that you operated an aircraft closer than 500 feet to a person, vessel, or structure.

to protect bird nesting places. One such float was located in front of the lot of his neighbor to the east.

Inspector Elgee was off duty on August 23, 1997. Earlier that day, he had made two flights in his Cessna 206 seaplane, bringing back to his home supplies and equipment he had used on a camping trip. He noticed that there appeared to be a wedding reception underway at the Lake Lucille Lodge. At about 4:15 p.m. in the afternoon, he was standing on a step attached to the fuselage of his seaplane, so he could reach the upper surface of the wing in order to refuel the aircraft. The aircraft was secured to his dock, with its nose pointed toward the shore. He was looking southwest when his attention was drawn to a bronze-colored Cessna 206 seaplane approaching from the southwest, heading towards the lake's south shore. According to Inspector Elgee, it made a diving pass over the lodge, and, at an altitude of 100 feet above ground level (AGL) flew out to about the center of lake, made a steep left turn, continued east, then made another steep left turn from which it did not roll out completely until it was heading west — a turn of 180 degrees — still at 100 feet AGL. He thought the aircraft was going to run into trees on the small point of land jutting out into the lake 300 feet to his left, or east, in front of his neighbor's house, and lost sight of part of the aircraft behind the trees. According to inspector Elgee, the aircraft leveled out heading west, at 100 feet AGL, lowered its flaps to 30 degrees, and landed on the surface of the lake in front of him, further out in the water than the float to his left, at a distance he variously estimated to be approximately 100-to-200 feet from the shore. Then, the aircraft step-taxied west to the Lake Lucille Lodge. Inspector Elgee said he did not observe any waverunners or jet skis (small boats) on the surface of the lake as the Respondent flew over the lake and landed.

Inspector Elgee stated that it was a bright, sunny day, with sunlight glare on the water looking to the southwest. He was not wearing his sunglasses when he saw the seaplane land on the surface of the lake in front of him. He acknowledged that the sunlight was so bright that he could not tell if there were passengers in the aircraft as it passed in front of him.

Inspector Elgee put on a shirt, picked up his credentials from his house, and drove his pickup truck to the Lake Lucille Lodge. There he saw several men on the dock turning the Cessna 206 seaplane around, and securing it to the dock. The Respondent, who was standing on the dock, identified himself as the pilot of the aircraft. Inspector Elgee identified himself, and looked at the Respondent's pilot's license, after he acknowledged that he was the pilot of the aircraft. He said he thought that the pilot had been showing off. Inspector Elgee said he had never met the Respondent before.

Inspector Elgee stated that he checked the Respondent's airman records, and found that he had three prior violations, one on September 7, 1988, another on September 13, 1991, and a third on September 25, 1992.

Inspector Elgee said that from a point over a 50 foot obstacle, it would take 1570 feet for the Cessna 206 with pontoons, to land on water and come to a halt. Starting from an altitude of 100 feet, it would take a greater distance. He said landing in front of his house was an appropriate distance to touch down from Lake Lucille Lodge. On

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cross-examination, he admitted that installation of a STOL kit could reduce those distances.

The Respondent, replied in writing to a letter of investigation sent by the FAA. In his letter, dated August 28, 1997, he said that he had aborted a landing on the lake upon his approach from the north, because of "erratic maneuvering by several jet skiers," and had then turned downwind for a west landing on the lake, made three 90 degree turns, "and landed west along the north shoreline of the lake." With the letter, the Respondent included a map of Lake Lucille and the real estate lots along its shore, upon which he drew the path of his aircraft over Lake Lucille on the day in question, until it landed on the surface of the lake. The scale of the map is not shown, but it appears from the drawing of the path of his aircraft that the Respondent touched down close to the north shore in the vicinity of Inspector Elgee's property. Without a distance scale, distances cannot be accurately determined from the map. However, it appears from this map, which was submitted by the Respondent in August 1997, that he was closer to the north shore when he touched down than where he depicted his touchdown point on photographs in evidence during the hearing in May 1999.

At the hearing, the Respondent strongly disputed the account of his landing given by Inspector Elgee. He stated that he flew his aircraft to Lake Lucille that day to pick up the bride and groom at the wedding reception at the Lake Lucille Lodge. The Respondent said he came in from the south, and passed to the left of the lodge heading towards the lake's south shore, with the intention of landing in the middle of the lake. He said that his aircraft was equipped with two STOL kits, which reduced its landing and takeoff speeds and distances, and he could have safely landed before reaching the south shore. He said he had to abort the landing, because jet ski boats darted in front his intended landing path. He added power, turned left, or to the east, but the jet skis were travelling on a parallel course and he could not land until they turned off. He then turned north to land, descended to 600 feet from a pattern altitude of 800 feet, and added another notch of flaps. According to the Respondent, the wind was from the south, and caused his aircraft to drift further north. He landed on the water surface 800-to-900 feet off shore, ¾ mile east of the Lake Lucille Lodge, and far enough to the east so that a point of land blocked his view of Inspector Elgee's property and Inspector Elgee's view of his landing.

The Respondent further testified that, after touching down on the surface of the water, he step-taxied towards the Lake Lucille Lodge. As he taxied, there were still boats and jet skis on the lake around the lodge, and he slowed to a normal taxi as he approached the lodge. According to the Respondent, a photograph of his aircraft taken by a guest at the lodge shows his aircraft in a step-taxi, somewhere between Inspector Elgee's property and the lodge, about 400 feet off shore, with a jet ski behind and to his left. The Respondent admitted that he was concentrating on the position of the jet ski, and was not paying attention to how close the shore was.

The Respondent was particularly resentful over the behavior of Inspector Elgee when he appeared at the lodge and confronted him in front of the wedding guests. He described Inspector Elgee has having "run amok", and said that since this incident, "he has made it a point to ramp me," and that "he needs to be stopped."

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Other witnesses called by the Respondent, supported his account of the landing. Steven Reeves, a private pilot with 1,000 flight hours, is a cousin of the bride. He did not know either the Respondent or Inspector Elgee, and had not been aware that an airplane was coming to pick up the bride and groom. He testified that he saw the Respondent's aircraft fly to the left of the lodge, at an altitude of 400 feet, heading south, and that the aircraft reduced power and lowered its flap to 20 degrees, but did not land on the lake because of the presence of jet skis. He said the aircraft then added power, climbed, circled the lake, and landed ¾-to-½ mile away, 700 to 800 feet from shore, and step-taxied to the dock. He did not see Inspector Elgee at the dock.

Allan J. Applehans, the father of the groom, who is acquainted with the Respondent through his son, saw the bottom and tail of an aircraft pass overhead for a landing to the south on the lake. He testified that the landing was aborted because of jet skis in the aircraft's path, and that the aircraft climbed, turned east, and landed 3,000 to 4,000 down the lake, a couple of hundred feet off shore. Mr. Applehans said there were some boats running around down there. He watched the aircraft taxi to the dock, and helped tie it down. He observed a man come through the crowd, show his credentials, and heard him demand to the see the aircraft's paperwork. He said the man appeared agitated, and he heard him comment that the landing was "way too low." Mr. Appelhans said he is a private pilot, but has not flown for three years.

Jesse Applehans, 18 years old, a brother of the groom, said he saw the Respondent's aircraft fly over the back side of the lodge, and try to land on the lake. He testified that the landing was aborted because of boats, and the aircraft turned and landed "pretty far down the lake in a channel." He said he wondered why the aircraft had landed so far away. Jesse Applehans took a number of photographs of the aircraft, including one while it was step-taxiing, which he described as occurring after the second bounce following the touchdown. He said he did not attempt to photograph the touchdown because the aircraft was too far away. He stated that the Respondent is his neighbor.

Letticia Applehans, the bride, saw the Respondent talking to Inspector Elgee, but did not hear the conversation. She "thought he was being a real jerk, ruining my wedding." She said she had to stand on the dock for 45 minutes.

Michael K. Larson was called as an adverse character witness against Inspector Elgee. He testified that Inspector Elgee's reputation for truth and veracity in the aviation community is very poor. This witness is the respondent in Case No. SE-15500, which was set for hearing on the day following completion of the hearing in this case. The investigating inspector in the Larson case was Inspector Elgee.

In rebuttal, the Administrator called as a witness Ivan A. Borgan, the Office Manager of the FAA's Anchorage Flight Standards District Office ("FSDO"). Mr. Borgan has known Inspector Elgee for two years, and deals with regularly in Inspector Elgee's capacity as the bargaining unit representative for the union to which the aviation inspectors in the Anchorage FSDO belong. In Mr. Borgan's opinion, Inspector Elgee's reputation for truth and veracity in the aviation community is good.

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Testifying in rebuttal, Inspector Elgee described step-taxiing as a high speed taxi in which only the rear portion, or step, of the pontoons touches the water surface. During a step-taxi the aircraft is close to flying speed, the wings develop lift, and the rudder and ailerons are effective. He said the pilot has to be careful not to go airborne while step-taxiing.

Inspector Elgee said he had spent only 10 minutes talking to the Respondent at the Lake Lucille Lodge, and further said that he felt uncomfortable in that setting, because people were celebrating. He denied singling the Respondent out for a subsequent ramp inspection.

II

There is conflicting evidence as to whether or not the touchdown point in Respondent's landing on the surface of Lake Lucille was immediately in front of Inspector Elgee, as he described, or further to the east of his position. There is, however, ample credible evidence establishing that once he had touched down on the surface of the lake, the Respondent came closer than 500 feet to where Inspector Elgee and his parked aircraft were located, and closer than 500 feet to structures on the shore. Although I find Inspector Elgee to be a disinterested and credible witness as to what he could see,[2] I further find his vision of the actual landing or touchdown of the aircraft may have been impaired by strong sunlight shining in his eyes, to the extent that he could not make out precisely the aircraft's actual touchdown point. He acknowledged that he was not wearing sunglasses, and that the sun was in eyes to the extent he could not see whether or not there were passengers in the Respondent's aircraft. But, while his ability to discern the precise touchdown point may have been impaired by the sunlight shining in his eyes, I credit his testimony he was able to see the aircraft as it step-taxied by his position, approximately 100 feet from him.

That the aircraft first touched down on the lake's surface to the east of Inspector Elgee's vantage point is consistent with the testimony of the witnesses who had been attending the wedding reception. But, they were from ½-to-¾ of a mile away, and, at that distance, I find their estimates of distances to be too unreliable to establish anything other than that the aircraft landed east of the Inspector Elgee's property and step-taxied for a considerable distance until it was close to the lodge, when it reduced speed to a

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[2] Inspector Elgee had not met the Respondent prior to this incident, and no evidence was introduced to establish that he had a grudge against the Respondent, or any personal interest in the outcome of the case, such as might give him reason to fabricate evidence of a violation of FARs by the Respondent. I find nothing about his demeanor on the witness stand to support a conclusion that he was an untruthful witness. I give no weight to the testimony of Mr. Larson that Inspector Elgee has a poor reputation in the aviation community for truth and veracity. Mr. Larson's opinion of Inspector Elgee is so affected by his own contact with Inspector Elgee that I find his opinion of Inspector Elgee's reputation for truth and veracity is unreliable. Even assuming, without making any such finding, that Inspector Elgee may have been overbearing and intrusive in his confrontation with the Respondent at the wedding reception, that does not tend to establish a lack of truthfulness. As an FAA aviation safety inspector, he had the authority to act in an official capacity when he perceived a violation of FARs, even when he was off-duty. That he might have found a less abrasive and intrusive way of handling the situation is not the issue, here. He clearly had the authority to act in an official capacity.

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normal taxi. I find they were too far away to accurately see when the aircraft passed the place where Inspector Elgee was, or how close it came to that particular location.

Even with the sun in his eyes, Inspector Elgee could see the aircraft as it step-taxied in front of him, and as an experienced pilot, accustomed to judging distances, I find his estimate that the aircraft was 100 feet away to be reliable. Although the Respondent denied coming that close to Inspector Elgee, his drawing of the flight path and landing, which he submitted to an aviation safety inspector in response to a letter of investigation, is consistent with Inspector Elgee's account — even taking into consideration that the map is neither drawn to scale nor usable to accurately measure distance — and is inconsistent with his own testimony during the hearing. In that rendering of the path of his aircraft, made soon after the incident, the Respondent appears to have placed himself considerably closer to the shore than as he depicted his path on drawings made during the hearing.

Further detracting from the reliability of his hearing testimony concerning how close he came to the shore after landing on the lake surface, the Respondent admitted that he was primarily concerned with staying clear of boats and jet skis, and was not paying close attention to how close he was to the shore.[3] Under the circumstances, I find that the Respondent's denial that he operated his aircraft closer than 500 feet from Inspector Elgee and his parked aircraft, and structures on the shore, to be unreliable.

Although the Administrator argues that the Respondent was showing off for the wedding guests, and that his entrance was to be the "grand finale", whatever the effect he may have intended to achieve initially, by the time he actually landed on the surface of the lake, he was so far away from the lodge that the landing was barely noticeable to the guests, and he was left with a very long taxi to reach the lodge. To cut down on the taxi time, he continued to operate his aircraft in a high-speed taxi, known as a step-taxi. But, as previously noted, his attention was diverted by the continued presence of jet skiers and he concentrated more on avoiding these little watercraft than on how close he was to the shoreline. Taking all of these factors into consideration, I find that the Respondent's actions in step-taxiing his aircraft within approximately 100 feet of Inspector Elgee and his parked aircraft, and within 200-to-300 feet of his house, was not part of a scheme or plan to impress the wedding guests, but was inadvertent, and not deliberate.

The principal violation alleged in this case is of FAR § 91.119(c),[4] by operating an aircraft closer that 500 feet to a person, vessel, vehicle, or structure when not necessary for a landing or takeoff. The first consideration is the well-established proposition that the site selected by a pilot for landing (in this case on a water surface)

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[3] I find that the video tape produced by the Respondent and played during the hearing does not accurately depict the conditions of his landing, and does not reliably show the position of his aircraft at the time relevant to this case. The video was shot during the winter, with the lake frozen, and no boats or waverunners present. As noted, the Respondent's path was primarily dictated by his efforts to remain clear of small craft on the surface of the lake.

[4] Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes: (c) *over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

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must be a suitable and appropriate choice. *Administrator v. Prior,* NTSB Order EA-4416 (1996), and cases cited therein. In this case, it is very clear that there was no necessity for the Respondent to land his aircraft on the surface of Lake Lucille at any particular point, and certainly not at a location made unsuitable because his landing would take him closer than 500 feet to a person, vessel, vehicle, or structure.

The Respondent had the whole of Lake Lucille to choose from when it came to selecting where to set down his aircraft. There is no evidence that there were other constraints limiting his choices, such as shortage of fuel or weather considerations. Insofar as the evidence shows, after aborting a touchdown near the lodge because of the presence of small watercraft, the Respondent chose to touch down as soon as he could, but chose another location where there were still watercraft present, and his maneuvering room was further restricted by the closeness of the north shoreline. That made his choice of a place to land unsuitable, particularly because he could have continued circling the lake until he found a location for his touchdown which presented no hazard. Accordingly, since the landing place on the lake that he chose was unsuitable, it was not necessary for a landing for him to come closer than 500 feet to a person, vessel, vehicle, or structure, and his operation of the aircraft in touching down on the lake surface and taxiing to the lodge violated FAR § 91.119(c).

The Respondent argues that there can be no violation of § 91.119(c), because he did not land or touch down on the surface of the lake within 500 feet of Inspector Elgee, his aircraft, or his residence, and his operation of his aircraft after touching down was on the surface of the lake and was subject only to right-of-way rules for water operations (FAR § 91.115). FAR § 91.119(c), however, is not limited to the landing itself, but covers any operation of the aircraft, including after touching down on the surface of water. Other regulations, such as § 91.115, may also apply when an aircraft is being operated on a water surface, but that does not exclude the applicability of § 91.119(c) here.

Even assuming that the Respondent could have brought his aircraft to a stop following touchdown before passing the location where Inspector Elgee was, he made no attempt to do that. Instead, he continued to operate his aircraft, within the meaning of § 91.119(c), in a high speed taxi maneuver, referred to as a step-taxi, for a much longer period of time and distance than otherwise would have been necessary to simply land and bring his aircraft to a safe stop. At that point, his operation of the aircraft had nothing to do with takeoff or landing, but simply involved repositioning the aircraft on the surface of the lake from one place to another, where he was going to pick up passengers.

"The altitude regulation exempts from its several minimum altitude restrictions only those operations that are 'necessary' for takeoff or landing." *Administrator v. Kline,* NTSB Order EA-4409 (1995). The regulation prohibits operation closer than 500 feet to any person, vessel, vehicle, or structure, except when necessary for takeoff or landing. The fact that he chose to land the aircraft on the water surface so far away from the lodge that he was left with a long taxi to the lodge after touching down was the result of his conscious choice, and was not necessary for his landing. He chose to cut down on the time required to traverse that distance after landing on the water by the high speed taxi maneuver known as a step-taxi. Since he was operating his aircraft when it was not

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otherwise necessary for takeoff or landing, he was subject to the requirement of § 91.119(c) that he operate it no closer than 500 feet from persons, vessels, vehicles, and structures. His passage within 500 feet of a person, vessel, or structure, was not immunized by the "necessary for landing" exception in FAR §91.119(c). *Administrator v. Kline, supra.* Accordingly, I find that the Respondent violated § 91.119(c), as alleged.

In addition to violating § 91.119(c) by operating his aircraft closer that 500 feet to persons, vessels, vehicles, or structures, the Respondent also violated FAR § 91.13(a). His operation of the aircraft under those conditions in a high-speed taxi maneuver in which the aircraft was on the verge of becoming airborne was careless, because it presented an unacceptable risk of loss of control when it was passing closer than 500 feet to a person, vessel, vehicle, or structure. An unexpected gust of wind or a wave could have caused the aircraft to suddenly become airborne, resulting in loss of control and possibly a catastrophic crash-landing endangering the lives or property of others.

The sanction sought by the Administrator in this case is a civil penalty in the amount of $2,200.00. The Administrator has cited no case precedent to support a civil penalty in this, or any other amount, for the conduct charged. While the fact that the Respondent's violations were apparently inadvertent and unintentional might otherwise be considered a mitigating factor, any mitigating effect is overridden by the evidence that he has a record of three prior violations, including one for which his airman certificate was revoked.[5] Taking that into consideration, I find the civil penalty of $2,200.00 assessed by the Administrator to be appropriate.

Upon consideration of all of the substantial, reliable, and probative evidence of record, I find that the Administrator has proven by a preponderance of the evidence that the Respondent violated FAR §§ 91.119(c) and 91.13(a), and that a civil penalty in the amount $2,200.00 is an appropriate sanction for those FAR violations.

Accordingly it is ORDERED that:

1. The Respondent's appeal is DENIED; and

2. The Administrator's order of assessment is AFFIRMED.

Entered this 3rd day of June, 1999, at Washington, D.C.

William A. Pope, II
Judge

[5] Because of the revocation, the three violations, which otherwise would have been expunged, remain part of the Respondent's airman record.

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APPEAL

Any party to this proceeding may appeal this initial decision by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and 3 copies of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of the other party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and 3 copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on the other party.

An original and 3 copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant,	:	
VS.	:	Docket No. SE-15533
RHETT T. HART, Respondent.	:	

HEARING

heard before the Honorable William E. Fowler, Jr., Chief Judge, Abraham A. Ribicoff Federal Building, 450 Main Street, Courtroom 619, Hartford, Connecticut, on June 10, 1999.

SUSAN K. WHITT, LSR, RPR
Licensed Shorthand Reporter #00001
ALLAN REPORTING SERVICE
One Holbrook Road
West Hartford, Connecticut 06107-1619
Telephone (860) 521-4749 Facsimile (860) 521-1925

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distance or height, and they have a difference of 300 feet, so just take that into consideration.

THE COURT: Thank you, Mr. Hart.

Any further comments by counsel for the administrator?

MR. GUNDERSEN: No, sir.

THE COURT: I wish to thank you, Mr. Gundersen and Mr. Hart, for your statements on behalf of your respective clients. I have reviewed the testimony of the six witnesses on behalf of the administrator as well as the four exhibits that the administrator has adduced, all of which have been duly admitted into the hearing record. The respondent is a sole witness on behalf of the respondent's side of the case. The respondent has two documents, Respondent's 1 and 2, which have been duly admitted.

The reporter will caption this oral initial decision an order.

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board concerning the appeal of Rhett Townsend Hart from an order of suspension issued by the Administrator of the

Federal Aviation Administration which seeks to suspend Respondent Hart's private pilot certificate No. 227258278 for a period of 150 days. Under the National Transportation Safety Board's rules of practice as they have been promulgated for utilization in FAR safety enforcement proceedings as we have here, under those rules, Section 821.42 of the board's rules of practice gives the judge in the proceeding the option to issue an initial decision forthwith following the conclusion of the proceeding, which I'm going to do at this time, as opposed to issuing a subsequent written decision.

The following notice To the parties to this matter came on for trial in Hartford, Connecticut, on June 10, 1999. The respondent, Rhett Townsend Hart, was present at all times, was unrepresented by counsel and chose to proceed on a pro se basis. The administrator was represented by Peter C. Gundersen, Jr., of the Regional Council's office, New England Region of the Federal Aviation Administration. Both parties have been afforded the opportunity to offer evidence, to present witnesses, to call and examine witnesses and to make final argument in support of their respective

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sides of the case.

[redacted], as I stated earlier, I have reviewed all of the testimony and the documentary exhibits which constitute the hearing record in this proceeding. The evidence by the administrator is not only clear and convincing, but it is very persuasive, and there is a wealth of testimony on behalf of the administrator to prove each and every allegation that the administrator has alleged in his order of suspension of February 1, 1999.

Mr. Paul Sweet, Mr. Walter Barker, Mrs. Judith Robinson are all percipient witnesses, or eyewitnesses, to use layman's language, as to what happened on April 18, 1998, in the area of Johnson Lane in Madison, Connecticut. Each and every one of the aforesaid witnesses testified that the respondent flew less than 500 feet in the proximity of their homes. Their homes are located in this Johnson Lane area. We have a wealth of evidence to indicate that this is very definitely a congested area, no question about it. Not only because of homes; there is a business section there; there is a highway, Interstate 95. It all adds up to one of the most congested areas in any case that I have heard. Usually in a case like

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this you have people, or you have homes, or you have a business. Here you have it all. You have people who came out of their homes because of the low flight of the respondent's aircraft. At least two of these witnesses were put in fear and apprehension by the respondent's flight.

Respondent has been very candid, ~~apparently~~ honest, and truthful, about his pattern of flying behavior during the course of this flight in the vicinity of Johnson Lane on April 18, 1998. Respondent says he was flying at approximately 500 feet or maybe a little better, according to the respondent. Even if this is so, it's still a violation. THE FAA regulation is very clear, never to fly over a group of people in a congested area or homes at an altitude of less than 1,000 feet. And then, as Inspector Hedman stated, this is not only a case of low flying, but it's an aggravated case of low flying because of the multiple passes, three passes, that the respondent made.

I can appreciate the respondent is a young airman. He has much of his career and his life still ahead of him. Respondent has stressed repeatedly that this is his livelihood, flying. I have been reversed by the National Transportation

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Safety Board on several occasions because I felt that the economic interest of the respondent, the pilot, was compelling. The board has ruled ad infinitum that economic interest is not a compelling interest where sanction is concerned, so I have no alternative in view of the fact that the administrator has adduced a wealth of testimony as to every allegation set forth in his order of suspension. I have no alternative as the judge in this proceeding but to uphold the sanction that the administrator has sought.

As Inspector Hedman has testified, if there had been an emergency where the operation of the respondent's aircraft was concerned which would have necessitated a landing of that aircraft in this Johnson Lane area, the chances were, to use a colloquialism, between slim and none of the respondent being able to make a safe emergency landing, so I cannot and will not determine, conclude or hold that in any respect the administrator was arbitrary or that he was not validly premised in bringing the charges or the allegations that he has set forth in his order of suspension, so that, ladies and gentlemen, I'm sure by this time you get the drift of my

determination, and that being so, I will proceed to make the following specific findings of fact and conclusions of law:

1. The respondent, Rhett Townsend Hart, admits and it is found that at all times relevant he is the holder of private pilot certificate No. 227252878.

2. The respondent admits and it is found that on April 18, 1998, the respondent acted as pilot in command of Civil Aircraft N32270, a Piper Cherokee, Registration No. PA28-151, owned by another, on a flight in the vicinity of Madison, Connecticut.

3. It is found that on said flight at approximately 1400 local time the respondent made three low-level passes over persons and residences in the area of Johnson Lane, Madison, Connecticut, at an altitude of approximately 120 to 200 feet above ground level.

4. It is found that at no time during the passes described in paragraph 3 above was it necessary to conduct such operation for the purpose of takeoff or landing.

5. It is found that during the passes referred to in paragraphs 3 and 4 above the

respondent operated said aircraft at an altitude which would not allow, if a power unit failed, an emergency landing without undue hazard to persons or property on the surface.

6. It is found that the respondent's operation of the aircraft in the manner and under the circumstances described above was reckless so as to potentially endanger the lives and property of others.

7. It is found by reason of the foregoing facts and circumstances that the respondent violated the following Federal Aviation Regulations: A, Section 91.119(a), B, Section 91.119(b), and, C, Section 91.13(a) as set forth in the administrator's order of suspension.

8. This judge finds that safety in air commerce or air transportation and the public interest does require the affirmation of the administrator's order of suspension dated February 1, 1999, in view of the aforesaid violations of Section 91.119(a), Section 91.119(b) and Section 91.13(a) of the Federal Aviation Regulations.

It is ordered adjudged and decreed, that the Administrator's Order of Suspension dated February 1, 1999, be and THE SAME is hereby affirmed.

This order is issued by William E. Fowler, Jr., ~~Administrator Law~~ CHIEF Judge.

APPEAL

Under the heading of appeal, either party to this proceeding may appeal the judge's Oral INITIAL Decision. The respondent must file within ten days of this order A NOTICE OF APPEAL which ~~was~~ issued on June 10th, 1999. In order to perfect his appeal, the appellant must file a brief within fifty days of the judge's Oral Initial Decision setting forth his objections to the judge's ~~oral initial~~ decision. The notice of appeal and the brief shall be filed with the Office of Judges, 490 L'Enfant Plaza, E., S.W., of the National Transportation Safety Board, Washington, D.C. 20594.

If no appeal to the board from either party is received, or if the board of its own volition does not choose to review the judge's oral initial decision ~~in~~ WITHIN the time allowed, ~~then~~ the judge's decision shall become final. Timely filing of ~~such~~ an appeal, however, shall stay the order as set forth in the judge's decision.

(Discussion off the record.)

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THE COURT: Let the record indicate the respondent has indicated he will be filing an appeal from the judge's oral initial decision. Let me set forth the time parameters once again: ten days from the date of decision to file a notice of appeal and fifty days from the date of the judge's decision to file a brief setting forth the respondent's objections to the judge's oral initial decision.

Very well. If there is nothing further at this time, I would declare the hearing closed, but before we go off the record, I would like to express my thanks to counsel for the administrator and to the respondent, as well as to all the witnesses who testified here for their help, assistance and cooperation during the course of the proceeding here today. Thank you all very much. We stand adjourned.

(The proceedings concluded at 2:08 p.m.)

Edited

7/1/99

MEJ

Served: June 11, 1999

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket No. SE-15500

MICHAEL K. LARSON,

Respondent.

WRITTEN INITIAL DECISION

Service: *Glenn H. Brown, Esq.*
FAA Alaskan Region
222 West 7th Avenue, Box 14
Anchorage, AK 99512-7587
(Served by fax and priority mail)

R. R. De Young, Esq.
Wade & De Young
Suite 200, A.G.C. Building
4041 B Street
Anchorage, AK 99503
(Served by fax and certified mail)

Michael K. Larson
2425 Merrill Field Drive
Anchorage, AK 99501-4123
(Served by regular mail)

This is a proceeding under the provisions of 49 U.S.C. § 44709 (formerly § 609 of the Federal Aviation Act) and the provisions of the Board's Rules of Practice in Air Safety Proceedings. Michael K. Larson, the Respondent, has appealed the Administrator's Order of Suspension, dated January 21, 1999, which, pursuant to § 821.31(a) of the Board's Rules, serves as the complaint,[1] in which the Administrator

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[1] The Administrator's Complaint states that:

1. You are now, and at all times mentioned herein you were, the holder of Airline Transport Pilot Certificate No. 18884581.

2. On or about July 8, 1998, you were the pilot in command of civil aircraft N76RA, a Piper Model PA-31, on a flight operated in air commerce under visual flight rules (VFR) by Lake Clark Air, Inc., from Merrill Field, Anchorage, Alaska, to Port Alsworth, Alaska.

3. During the above flight, there were seven passengers on board the aircraft.

4. At least some of the passengers on board the aircraft paid compensation for that flight. The flight was therefore subject to Part 135 of the Federal Aviation Regulations.

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ordered the suspension of the Airline Transport Pilot Certificate and any other certificate issued to Respondent under Part 61, because of alleged violations of §§ 91.13(a) and 135.203(a)(1) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.).[2]

I

On the morning of July 8, 1998, the Respondent, was the pilot in command of civil aircraft N76RA, a Piper Model PA-31, owned by Lake Clark Air, Inc., a Part 135 carrier, on a flight from Merrill Field, Anchorage, Alaska, to Port Alsworth, Alaska, through Lake Clark Pass, with passengers on board. Most of Lake Clark Pass is located in Lake Clark National Park, and is a route frequently used by aircraft flying through the Alaska Range between Kenai, Alaska, and Port Alsworth, Alaska, which is located on Lake Clark, in Lake Clark National Park. Lake Clark National Park is in a remote region of Alaska, accessible only by air or boat, and is noted for big game hunting and fishing.

There is no dispute that, while flying through Lake Clark Pass, the Respondent's aircraft passed a Cessna 206 seaplane operated by FAA Aviation Safety Inspector, John O. Elgee, who was assigned to the FAA's Anchorage Flight Standards District Office.[3] Inspector Elgee, who was off-duty, was on a personal fishing trip with three passengers to the Lake Clark area. When the Respondent's aircraft passed Inspector Elgee's, the two aircraft were both heading towards Port Alsworth. The Respondent's Piper PA-31 (known as a Navajo) is a nine-passenger twin-engine aircraft, with a cruising speed of approximately 160 knots. The Cessna 206 with pontoons is four passenger single engine aircraft with a cruising speed of less than 100 knots. By the time Inspector Elgee landed his aircraft on Lake Clark, the Navajo had departed on another flight.

There are two principal issues in this case. The first of these issues is whether the flight at issue was a commercial flight, conducted for compensation or hire, or whether it was, instead, a flight conducted under Part 91 of the FARs. The Administrator contends that the flight at issue was a commercial flight operated by the Respondent under FAR Part 135. The Respondent disputes this contention, and argues that the flight was a Part 91 flight. The second issue, which need be reached only if the flight is found to be a Part 135 flight, is whether it was flown at an altitude proscribed for Part 135 operations under FAR § 135.203(a)(1) when it passed Inspector Elgee's

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5. During the above flight, while you were passing through Lake Clark Pass, you operated civil aircraft N76RA at an altitude that was less than 500 feet above the ground.

6. Your operation of civil aircraft N76RA, as described above, was careless or reckless so as to endanger the life or property of another.

Based on the foregoing facts and circumstances, you violated the following Federal Aviation Regulations:

(a) Section 91.13(a) in that you operated an aircraft in a careless or reckless manner so as to endanger the life or property of another.

(b) Section 135.203(a)(1) in that you operated an airplane on a flight subject to Part 135 of the Federal Aviation Regulations during the day at an altitude that was less than 500 feet above the surface or less than 500 feet horizontally from an obstacle.

[2] The Respondent has denied violating FARs, as alleged in the complaint.

[3] While the fact that the two aircraft passed each other is not disputed, the precise location in Lake Clark Pass where that happened is disputed.

aircraft in the vicinity of the Lake Clark Pass. The Administrator contends that the Respondent's aircraft passed below and to the left of Inspector Elgee's aircraft, at an altitude of 200 feet above the ground. The Respondent disputes Inspector Elgee's identification of the area in which the two aircraft passed, and contends that his altitude was between 500 to 700 feet above the ground.

II

Lake Clark Air, Inc., is owned by Glenn R. Alsworth, Sr., (herein "Alsworth") and his wife. It is a Part 135 carrier certificated for commercial operations, and operates about a dozen aircraft. At all times relevant to this case, the Respondent was the chief pilot of Lake Clark Air. Several of the aircraft operated by Lake Clark Air are leased from a company owned by Alsworth and his wife, and Mark Lang, and his wife.

Alsworth who is a licensed Alaska guide, is in the business of guiding hunting and fishing parties in remote regions of Alaska. His base of operations is Port Alsworth, Alaska, which is located on Lake Clark. He is the holder of an Airline Transport Pilot certificate, with 17,700 flight hours. He uses Lake Clark Air aircraft in his guiding business, as well as for personal and charitable purposes. He said that 95% of the use of Lake Clark Air's aircraft is for Part 91 flights, and that 75% of those flights are operated for his guiding business.

Alsworth and his wife also operate the Farm Lodge located in Port Alsworth on Lake Clark, in which his guiding clients and other guests stay. Mark Lang and his wife operate the nearby Alaska's Lake Clark Inn in Port Alsworth. Mark Lang works for Alsworth as a guide, and provides lodging and guide services to guests at his inn. There is no evidence that Lang and his wife have any ownership interest in the Farm Lodge, or that Alsworth and his wife have any ownership interest in Alaska's Lake Clark Inn.

Alsworth testified that he did not charge any of the passengers on the flight at issue in this case for passage on the aircraft, and that he did not receive payment for carrying the passengers from any other source. He stated that Lake Clark Air receives no payments from the Farm Lodge, or from Lang or Alaska's Lake Clark Inn, for transporting guests staying at the two lodges between Anchorage and Port Alsworth. He stated that half of the guests at Alaska's Lake Clark Inn are transported free of charge on Lake Clark Air on a space-available basis.. Alsworth further stated that he does not keep separate records of the fuel used by Lake Clark Air's aircraft for his guiding and lodge business. He also said that the flights by Lake Clark Air transporting passengers staying at the Farm Lodge or Alaska's Lake Clark Inn are Part 91 flights. Alsworth further related that he transports residents of the Lake Clark area to and from Anchorage free of charge on a space-available basis.

Alsworth testified that he believes Inspector Elgee is biased against his company and has a personal vendetta against him, citing an incident involving the fueling of an aircraft, which led to the suspension of the pilot certificate of one of his employees, after

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Inspector Elgee had assured him that nothing would come of the incident.[4] Alsworth stated that he told the FAA he did not want Inspector Elgee on his property, and that he has banned the inspector from his property because he was not truthful.

The Farm Lodge has a capacity of 16 guests. The manager and host of the Farm Lodge is Glenn R. Alsworth, Jr., (herein "Alsworth Jr.") the son of Glenn Alsworth, Sr. Alsworth Jr. testified that guests at the Farm Lodge pay a package price of $500 to $600 per week for their stay, plus additional charges depending upon the nature of their activities while staying at the lodge. The basic package price begins and ends in Anchorage, Alaska, and includes roundtrip air transportation between Anchorage and Port Alsworth on Lake Clark Air, and accommodations at the lodge. It appears that the activities for which there may be additional charges include guiding services involving sightseeing, hunting, and fishing. As roundtrip air transportation is included in the package price, the guests do not pay Lake Clark Air for their air transportation. Alsworth Jr. said that he told Inspector Elgee that two guests at the Farm Lodge named Alexander were on board the Lake Clark Air flight at issue on July 8, 1998. Their package was for a stay of two nights. Alsworth Jr. said the Alexander's paid something for their package, but he did not recall how much, or what it included, beyond transportation and lodging.

Inspector Elgee testified that he called Lang at Alaska's Lake Clark Inn on July 8, 1998, and asked if he had guests on board the Lake Clark Air flight at issue. Lang acknowledged that he had guests on board, but declined to give their names. Lang stated to Inspector Elgee that he did not pay any money to Lake Clark Air for such flights, but that he just calls Lake Clark Air and they fly his guests.

Lee F. McGarr, an FAA aviation safety inspector, was the Principal Operations Inspector for Lake Clark Air from October 1997 to November 1998. At the request of Inspector Elgee, he contacted Christie Elliott, who, he said, runs the Lake Clark Air office at Merrill Field in Anchorage, Alaska. According to Inspector McGarr, Elliott said that there were a couple of lodge guests on the flight at issue, and the flight was one of two or three regular trips a day made by Lake Clark Air between Merrill Field and Port Alsworth. Inspector McGarr testified that Elliott said that the subject flight was either a Part 135 flight or a charter flight.

Inspector McGarr stated that Lake Clark Air flew on-demand charter flights, and made charitable flights from Soldatna, Alaska, and that he was not aware that they flew Part 91 flights. Inspector McGarr also said he had not been aware that Lake Clark Air transported lodge guests. He made the assumption that the lodge guests were air taxi passengers because there was a load manifest listing passengers. He admitted that he had no knowledge of financial arrangements between Lake Clark Air and the Farm Lodge.

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[4] The pilot involved in that incident was employed by Lake Clark Air full time from 1989 to 1992, and part time until 1996. He is now a free lance pilot and a pilot for Samaritan's Purse, for which he makes humanitarian flights to Russia and the Far East using Lake Clark Air aircraft. His encounter with Inspector Elgee took place in 1994, when he refused to permit Inspector Elgee to perform a ramp check on a Lake Clark Air Super Cub aircraft at Port Alsworth.

Elliott has worked for Lake Clark Air for 11 years, both in Anchorage and in Port Alsworth. She described her duties as cleaning aircraft, keeping the company books and answering the phone. She said that she also works for the Farm Lodge, for which she does bookkeeping, ordering and purchasing, and cooking. She denied that she is the office manager or an officer of Lake Clark Air, that she is named in Lake Clark Air's operations specifications, or that she has any ownership interest in Lake Clark Air. Elliott admitted that, on July 11, 1998, she gave Inspector Garr a load manifest for the July 8, 1998, flight, but denied that she acknowledged that it was a Part 135 flight. She testified that she gave a copy of the same manifest, on request, to Inspector Elgee on July 13, 1998. Elliott described the flight manifest as a computer-generated weight and balance form used by the company for all multi-engine aircraft flights.

Elliott further testified that the Farm Lodge's guests are not transported for compensation, and that Lake Clark Air receives no compensation for transporting them; thus, they are Part 91 flights. She denied having any knowledge of financial arrangements between Alsworth and Lang. She said that she keeps separate books for Lake Clark Air and the Farm Lodge, and that she keeps records of the seats used by the Farm Lodge, Alaska's Lake Clark Inn, and Alsworth for his guiding business. She said that all expenses of Lake Clark Air, including maintenance expenses, are paid from a common Lake Clark Air bank account. She described other flights by Lake Clark Air as Part 91 charitable and religious flights to Russia and taking kids to camp, and family flights. She further related that members of the Port Alsworth community can fly "space available" on Lake Clark Air aircraft.

The Respondent, testified that, on July 8, 1998, he was the chief pilot for Lake Clark Air, but that he has not held that position since the end of July 1998. According to the Respondent, N76RA is a nine-passenger aircraft, and the operating cost of that aircraft is approximately $250 per hour, which includes maintenance. The Respondent further testified that the cost of renting a Navajo is $450 per hour, and that, for a Part 135 roundtrip flight to Port Alsworth from Anchorage, Lake Clark Air currently charges $275 per person.

The Respondent stated that he reported directly to Alsworth. His responsibilities were flight training, supervising the company's pilots, and making sure the aircraft has current charts. He did not assign pilots or dispatch flights. He said that this was done by Alsworth, which posed something of a problem in Alsworth's absence, because there was no operations manager. The Respondent also said that Alsworth determined who the passengers were. He denied that he had any role in determining whether Lake Clark Air's flights were Part 135 flights or Part 91 flights, and that, because he did not know, he flew every flight as though it was a Part 135 flight. At one point, he said he never had any discussion with Alsworth about whether passenger flights were Part 91 or Part 135 flights, and received no instructions from Alsworth about whether to treat the flights as Part 91 or Part 135 flights. He said he just assumed that they were Part 135 flights, so he recorded all of his flights the same way, and never flew over 8 hours per day. The Respondent instructed the other pilots not to fly over 8 hours per day or exceed duty times. He stated that he instructed the other pilots on how to differentiate between Part 91 and Part 135 flights under the FARs, but gave no instructions on how they were to make such a determination under Lake Clark Air's practices.

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The Respondent also testified that Alsworth had told him that guiding flights were conducted under Part 91.[5] According to the Respondent, guiding activities went on throughout the year, with fishing in the summer, and hunting in the fall. He said that he did not know what the financial arrangements were for people staying at the Farm Lodge or Alaska's Lake Clark Inn, and that on any given flight, he probably did not know where the passengers were staying. The Respondent testified that Lake Clark Air carried guiding passengers in July, and that. on the day of the flight at issue, his next stop was at Nondalton, at the lower end of Lake Clark, where Alsworth conducted guiding activities. He picked up passengers there and flew them back to Anchorage. He said any time he flew passengers for the lodges at Nondalton or Igiugig, which had no ties to Alsworth, the flights were Part 135 flights.

III

On the one hand, a seemingly persuasive argument can readily be made that flights transporting hunting and fishing clients of hunting and fishing guides and guests at hunting and fishing lodges, in any context other than in Alaska, could be considered to be flights for compensation or hire (commercial operations) subject to Part 135 or Part 121,[6] notwithstanding that the flights are not billed separately to the clients or guests. Clearly, operation and maintenance of aircraft involve substantial continuing costs (not to mention the cost of acquiring aircraft), and where air transportation is an integral part of a guiding business, or operation of a hunting and fishing lodge, they are a business expense, which the guides and lodge operators must pay out of the revenue generated from customers for their guiding activities or from guests at their lodges. It is, thus, apparent that the ultimate source of the funds to operate such flights are the users of the guiding business services – *i.e.*, the hunting and fishing clients and lodge guests. They may not pay for their transportation separately, but it is a cost of doing business built into the package price which they pay for guiding services and lodging. It seems to be a distinction without difference in determining whether flights are for compensation or hire whether the cost of the flight is paid by the passengers directly or indirectly – either way *they* pay for their transportation.

In Alaska, however, the answer to whether guide flights or flights transporting guests at hunting and fishing lodges are commercial operations is anything but clear. Since 1963, according to the United States Circuit Court of Appeals for the District of Columbia in its very recent decision in *Alaska Professional Hunters Association, Inc., v. Federal Aviation Administration,* __F.3d__ (Dkt. 98-1051, D.C. Cir., June 4, 1999), "the FAA, through its Alaskan Region, has consistently advised guide pilots that they were not governed by regulations dealing with commercial pilots." In January 1998, however, the FAA drastically altered the situation by publishing a Notice to Operators, "aimed at Alaskan hunting and fishing guides who pilot light aircraft as part of their guiding business," requiring these "guides pilots to abide by FAA regulations applicable to commercial air operations." The Alaska Professional Hunters Association, Inc., and two individual guide pilots petitioned for judicial review of the FAA's Notice, and, in the

[5] At another point in his testimony, the Respondent indicated that he could not recall if Alsworth specifically told him that flights of his passengers to Port Alsworth were Part 91 flights, but he assumed that they were.
[6] FAR §§ 1.1, 119.1(a)(1), 121.1(a), and 135.1(a)(1).

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decision cited above, the Court of Appeals for the District of Columbia Circuit held that the FAA's Notice had been published without notice and comment, as is required by the Administrative Procedure Act, and that the Notice was, therefore, invalid. The result of that decision is to restore the situation to the *status quo ante* before publication of the FAA's Notice.

In *Alaska Professional Hunters Association*, the Court of Appeals for the District of Columbia Circuit described the situation as follows:

> Fishing and hunting are big business in the State of Alaska. A large proportion of the State's population depends on the income these activities generate. Small lodges in remote regions of the State cater to hunters and fisherman, providing food and shelter, guide services, and air transportation to and from the lodge and on side trips, all for a flat fee. It is common for a fishing or hunting guide to serve as the pilot of light aircraft typically used in these operations. Beginning in 1963, the FAA, through its Alaskan Region, consistently advised guide pilots that they were not governed by regulations dealing with commercial pilots.
>
> The advice stemmed from Administrator v. Marshall, 39 C.A.B. 948 (1963), a decision rejecting the FAA's attempt to sanction Ralph E. Marshall, a registered Alaskan hunting and fishing guide and the holder of an FAA-issued private pilot license. On a hunting trip, Marshall flew his customer out of Kotzebue, Alaska, searching for polar bear. Regulations then in effect said that a "private pilot may pilot aircraft in connection with any business or employment if the flight is merely incidental thereto and does not involve the carriage of persons or property for compensation or hire." See Marshall, 39 C.A.B. at 948 n.1. The Civil Aeronautics Board, adopting the hearing examiner's opinion as its own, ruled that Marshall's flight with the hunter in search of polar bear was "merely incidental" to his guiding business, in part because he had not billed for it separately. See id. at 950-51.

The Court of Appeals refused to accept the narrow interpretations of the *Marshall* case urged by the Administrator. The Court pointed out that the Alaskan Region had, for 30 years, "uniformly advised all guides, lodge managers, and guiding services in Alaska that they could meet their regulatory responsibilities by complying with the requirements for [P]art 91 only." It went on to say that, "even if the FAA as a whole somehow had in mind an interpretation different from that of its Alaskan Region, guides and lodge operators in Alaska had no reason to know this." In holding that, if the FAA now wishes to apply commercial flight regulations to Alaskan guide pilots and lodge operators, it first must give them an opportunity to comment, the Court said:

> Those regulated by an administrative agency are entitled to "know the rules by which the game will be played." See Holmes, Holdsworth's English Law, 25 Law Quarterly Rev. 414 (1909). Alaskan guide pilots and lodge operators relied on the advice FAA officials imparted to them – they opened lodges and built up businesses dependent on aircraft, believing their flights were subject to [P]art 91's requirements only. . . . That advice became an authoritative departmental interpretation, an administrative common law applicable to Alaskan guide pilots.

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IV

In summary, Alsworth is a registered Alaska guide, and he and his wife are the operators of the Farm Lodge in Port Alsworth, Alaska, which is a hunting and fishing lodge located in a remote region of Alaska accessible only by air and water. An integral part of his guide business and lodge operation is Lake Clark Air, which he and his wife also own. The Respondent was employed by Alsworth as the chief pilot of Lake Clark Air. Lake Clark Air provides air transportation to the Farm Lodge's guests between Anchorage and Port Alsworth, as part of a package price. Lang and his wife are also operators of a hunting and fishing lodge in Port Alsworth, which, although apparently a separate business from the Farm Lodge, is somehow connected with the guiding business operated by Alsworth, for whom Lang works as a guide. Lake Clark Air also provides air transportation, at no separate charge, to at least some of the guests at Alaska's Lake Clark Inn. There is nothing in this record to suggest that guests at Lang's lodge do not also pay a package price which includes air transportation.

On these facts, I find that the air transportation provided by Lake Clark Air to guests at the Farm Lodge and Alaska's Lake Clark Inn in July 1998 was incidental to these lodge operations, and, as such, was covered by the FAA's advice that guide pilots and lodge operators were subject to Part 91's requirements only.[7] I find, therefore, that the flight at issue in this case was subject only to the requirements of Part 91 of the FARs.

V

The principal violation with which the Respondent is charged is violation of FAR § 135.203(a)(1), for operating an airplane on a flight subject to Part 135 during the day at an altitude less than 500 feet above the surface or less than 500 feet horizontally from an obstacle. Inasmuch as the flight at issue was conducted under FAR Part 91, and not Part 135, the Respondent did not commit a violation of FAR § 135.203(a)(1), even if, assuming, *arguendo,* he did operate his aircraft closer than 500 feet above the surface or less than 500 feet horizontally from an obstacle.[8] As there was no violation of FAR §

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[7] Although, in view of this holding that the flight was conducted under Part 91, it is unnecessary to decide whether the Respondent either knew or should have known that the flight at issue was a Part 135 flight, I find that he neither knew nor should have known that to be the case. Even assuming, *arguendo,* that it was a Part 135 flight, he lacked actual knowledge of that in view of the instructions from his employer that such flights were Part 91 flights. Further, in view of the consistent advice from the FAA's Alaskan Region given to guide pilots and lodge operators that such flights were subject to Part 91, the Respondent could not reasonably have known that they were Part 135 flights, even if that is assumed to be the case.

[8] In view of my finding that the flight at issue was conducted under Part 91, and not Part 135, there is no necessity to decide whether, as charged in the complaint, while transiting Lake Clark Pass at some point, the Respondent operated N76RA below 500 above the ground. There is, however, credible testimony from witness Boyd Waltman, an FAA Aviation Safety Inspector, Airworthiness, who was a passenger on Inspector Elgee's aircraft and was an eyewitness to the flight in question when it passed Inspector Elgee's aircraft in Lake Clark Pass, that the Respondent's aircraft was travelling at an altitude of less than 500 feet above the ground. In sharp contrast to the personal animosity between Alsworth and the Respondent, on the one side, and Inspector Elgee, on the other, which permeated the hearing, Inspector Waltman was a totally disinterested and convincing witness, who, by chance, happened to be on board Inspector Elgee's aircraft when the incident occurred. Were I to make a finding on the issue of the altitude of N76RA when it

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135.203(a)(1) committed, there was also no violation of §91.13(a). Accordingly, the complaint against the Respondent must be dismissed.

Therefore, upon consideration of all of the evidence of record, I find that a preponderance of the substantial, reliable, and probative evidence of record does not establish that Respondent violated FAR §§135.203(a)(1) and 91.13(a), as alleged in the complaint, and that safety in air commerce and air transportation and the public interest do not require affirmation of the Administrator's Order of Suspension.

Accordingly, it is ORDERED that:

1. Respondent's Appeal is GRANTED;

2. The Administrator's Order of Suspension is REVERSED; and

3. The Complaint is DISMISSED.

Entered this 11th day of June, 1999, at Washington, D.C.

William A. Pope, II
Judge

passed Inspector Elgee's aircraft in the vicinity of Lake Clark Pass on July 8, 1998, I would find Inspector Waltman to be an entirely credible witness who had a full opportunity to make a judgment of the altitude of N76RA, based on his visual sighting of that aircraft and his view of the instruments on Inspector Elgee's aircraft, and I would credit his testimony that, when he saw the Respondent's aircraft pass beneath and to one side of Inspector Elgee's aircraft, it was flying at an altitude of less than 500 feet above the ground.

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APPEAL

Any party to this proceeding may appeal this initial decision by filing a written notice of appeal within 10 days after the date on which it has been served. An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 5531
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and 3 copies of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of the other party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and 3 copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on the other party.

An original and 3 copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rules 43, 47 and 48 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. sections 821.43, 821.47 and 821.48) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

BEFORE THE

NATIONAL TRANSPORTATION SAFETY BOARD

In the Matter of:

JANE F. GARVEY, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

vs.

EDWIN A. ALLSEITZ, JR.,

Respondent.

Docket No. SE-15627

Hearing Room, Council Chambers
Katy Municipal Complex
910 Avenue C
Katy, Texas

Thursday,
June 17, 1999

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE: HON. WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

STELLAMARIS WILLIAMS, ESQ.
Office of Regional Counsel
4400 Blue Mound Road
Fort Worth, Texas 76193-0007

On behalf of the Respondent:

EDWIN A. ALLSEITZ, JR., pro se
30310 Misty Meadow
Magnolia, Texas 77355

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BEFORE THE

NATIONAL TRANSPORTATION SAFETY BOARD

In the Matter of:	)	
	)	
JANE F. GARVEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,	)	
	)	
Complainant,	)	
	)	
vs.	)	Docket No. SE-15627
	)	
EDWIN A. ALLSEITZ, JR.,	)	
	)	
Respondent.	)	

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board, and the hearing was held here in Katy, Texas, this 17th day of June of 1999.

The matter came on for hearing on the appeal of Mr. Edwin A. Allseitz, Jr., from an emergency order of revocation that has revoked his student pilot's certificate.

The emergency order of revocation serves as complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through regional counsel of the Southwest Region.

The matter has been heard before me, William R. Mullins. I am an Administrative Law Judge for the National Transportation Safety Board, and as provided by the Board's rules, I will issue a bench decision today.

The Administrator was present throughout these

proceedings and was represented by Ms. Stellamaris Williams, Esquire, of the Regional Counsel's Office, and the Respondent, Mr. Allseitz, was present at all times and represented himself.

The parties were afforded a full opportunity to offer evidence, to call, examine, and cross-examine witnesses, and in addition, the parties were afforded an opportunity to make argument in support of their respective positions.

DISCUSSION

As I indicated, the matter was on on this emergency order of revocation, and I won't go through all of the specifics. I think it's only important that I point out that there were allegations in paragraphs 2 and 3 of cross-country solo flights by this Respondent, when he had not been endorsed by a flight instructor to make those flights, and the last flight alleged, which was from Safford, Arizona, to Holloman Air Force Base, New Mexico, came through the White Sands Missile Range, and culminated in a landing at Holloman Air Force Base without permission to go through that restricted area or to land at the air force base, and those flights resulted in the allegations which have all been admitted by the Respondent.

The Administrator did withdraw, at the outset of the hearing, the allegations concerning making the

flights without a valid student pilot's certificate or a medical certificate. That was withdrawn, and the Administrator also withdrew the allegation that the flights were made during the nighttime, without a night solo flight endorsement. And those are paragraphs 4, 5, and 18. The regulatory violations which were contained in paragraphs (a), (b), and (c) then of the complaint were also withdrawn.

The other paragraphs were admitted by Mr. Allseitz, and based on those admissions, it really -- there was really not a decision for me to make. The admission to those other allegations will support the Administrator's sanction sought of a revocation of the Respondent's student pilot's certificate.

Mr. Allseitz, I would suggest to you one thing in closing, and if I could draw an analogy: I grew up on a farm in northern Oklahoma and ranch, and I learned to drive cars and pickups and tractors out in the pasture when I was just a child. But I still wasn't trained enough to go out on the highway.

And you could be trained all that you want to be on how to operate a car, start it, stop it, shift the gears and do all of those things, but if you get out on the highway and you don't know which side of the road to drive on, then you're creating a reckless situation.

And, basically, going through that missile grounds out there without permission, probably one of the most highly restricted areas in the United States, and as I understand it and hearing the cases I've heard -- you can get permission to go through some restricted area; I've never heard of anyone getting permission to go through White Sands, you know, on a general aviation flight.

But that's tantamount to driving the wrong way on an interstate, because if you're out there and you don't have permission, you're creating a situation that is not only dangerous to yourself, but it's dangerous to all of those military pilots who are operating out there.

And I suspect that one of those F-16s could go right through the middle of that Grumman, and they might not even know they hit you, but it might tear off their antenna or something like that, which creates a danger to their property.

But the allegations alleged here, which you've admitted, and all of the regulatory allegations I found that you were in violation of, which includes the balance of those except for the three that were withdrawn by the Administrator -- and I could go through those for the record, but I don't need to; they're set out therein.

I find that your admissions show that you were

in regulatory violation of all of those, and therefore, the Administrator's order of revocation will be affirmed.

ORDER

It is therefore ordered that, based on a preponderance of the evidence received today and more specifically based on the stipulations and admissions made by this Respondent, I find that the emergency order of revocation should be and the same is hereby affirmed.

William R. Mullins
Administrative Law Judge

JUDGE MULLINS: Mr. Allseitz, you have the right to appeal this order today, and because it is an emergency case, your appeal needs to be filed within two days of this date, with the National Transportation Safety Board, Office of Administrative Law Judges, in Washington, D.C. And basically it's Room 5531, 490 L'Enfant Plaza E Southwest, Washington, D.C. 20594. And I'm going to hand you a copy that has all of those addresses.

And then within five days of your appeal, you need to file a brief that also goes to the National Transportation Safety Board, but the brief goes to the Office of General Counsel, which is at a different room number but that same address.

Because it is an emergency case, the Board will announce a decision on your appeal. If you file an appeal within -- the entire procedure has to be completed within 60 days of the filing date of the complaint, and that filing date was May 21, so if you file your notice of appeal, the Board will issue a decision by July 21.

In any event, I would ask that you step up, Mr. Allseitz, and I'll hand you a written copy of your rights to appeal, and it has those addresses and has all the information you need to have, if you wish to appeal the order. (Handing document.)

Mr. Allseitz, do you have any question about

the decision today?

MR. ALLSEITZ: Well, yes. In the event that appeal wasn't granted to me, is there like a two-year period -- I don't know what the procedure is. Is there like a ten-year period or some time --

JUDGE MULLINS: No. A revocation normally is one year. However, this is the kind of case -- and if I can explain it to you -- if you'd held a private pilot's certificate and you'd done this, the Administrator might have even given you -- had you do some remedial training, to see whether or not you ought to have a private pilot's certificate.

Because it's a student pilot's certificate and you went out there and did all those things without those endorsements -- and the endorsements and the question I asked Mr. Sipps -- it's clear why they have the endorsements. If you'd have had an endorsement from an instructor, he would have made sure you didn't fly through that area that you went through.

MR. ALLSEITZ: Right.

JUDGE MULLINS: And he would have told you exactly how to do that flight and the frequencies you should have been on with your radio, and all of those things.

But in any event, the revocation is for one

year. You might -- if you go out and get some more flight instruction -- and you can get more flight instruction within -- well, I'm not sure that you can within that year, but you can do the ground work without having to solo.

You might petition the Administrator before the expiration of a year to reissue a student pilot's certificate, but that will be something strictly between you and the Federal Aviation Administration. The Safety Board doesn't have anything to do with that.

But normally a revocation is for one year, unless it's for drug-dealing, and then it's a lifetime revocation. Okay?

Does the Administrator have any question about the order?

MS. WILLIAMS: Your Honor, I -- no. No questions about the order. I understand that -- I don't believe I have the certificate yet.

Do you have the certificate with you?

JUDGE MULLINS: Have you surrendered your student pilot's certificate?

MR. ALLSEITZ: I made a statement that I don't have it. I think that -- I don't know where it is; I don't have it.

JUDGE MULLINS: Did the people at the air force

base take it?

MR. ALLSEITZ: That's what I thought. I wondered -- I gave it to -- I remember giving it to you, and I don't have it since then. I have looked everywhere for it, and I don't have it.

It was in my --

JUDGE MULLINS: It is revoked, and you need to -- if you have it, you need to find it, because one of the things they're going to -- if you come back in prior to the expiration of a year, one of the things they're going to look at is whether or not you ever gave it back to them.

Everything in the file is going to be a factor --

MR. ALLSEITZ: Well, if I find it, I will certainly surrender it.

MS. WILLIAMS: Your Honor, as an alternative to Mr. Allseitz, you can send an affidavit to that effect, and --

MR. ALLSEITZ: I already did that.

MS. WILLIAMS: -- we can put that in the file.

MR. ALLSEITZ: I did just what you asked. I sent the affidavit. It was attached to my answer.

JUDGE MULLINS: Attached to your answer?

MR. ALLSEITZ: Uh-huh.

JUDGE MULLINS: Oh.

MS. WILLIAMS: We'll work that out another time, Your Honor.

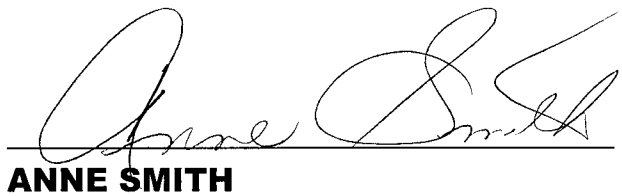
JUDGE MULLINS: All right. Then that concludes the hearing. Thank you, folks.

The hearing is terminated.

(Whereupon, at 10:20 a.m., the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and Order which was signed and edited on July 7, 1999, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 7th day of July 1999.



ANNE SMITH
Paralegal Spec/Hearings Asst.
Circuit IV, WILLIAM R. MULLINS
Administrative Law Judge
Arlington, Texas

EDWIN A. ALLSEITZ, JR.
SE-15627

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, vs. EVAN L. WHEELER, Respondent.	)	Docket No. SE-15494

Tuesday
June 22, 1999

Pope & President Conference Rm
Fairbanks Airport Terminal
Fairbanks, Alaska

The parties met, pursuant to notice of the Judge, at 1:28 p.m.

BEFORE: HON. WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

For the Complainant:

HOWARD MARTIN, ESQ.
FAA, Alaska Region
222 West 7th Avenue, #14
Anchorage, Alaska 99513

For the Respondent:

WILLIAM R. SATTERBERG, JR., ESQ.
709 Fourth Avenue
Fairbanks, Alaska 99701

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board held under the provisions of section 44709 of the Federal Aviation Act of 1958, as amended, on the appeal of Evan L. Wheeler from an order of suspension that initially sought to suspend his airman certificate for a period of 45 days; however, the Administrator has moved during the course of this proceeding to amend that order of suspension to seek a 30-day

suspension of that airman certificate.

The order of suspension serves as the complaint in our proceedings and was filed on behalf of the Administrator through the Alaska region of Anchorage. The matter has been heard here in Fairbanks, Alaska, to day, the 22nd day of June 1999 (sic) and has been heard before me, William R. Mullins. I'm the Administrative Law Judge, and as is provided by the Board's rules, I will issue a bench decision today.

The matter came on for hearing pursuant to notice to the parties and the Administrator was represented at all times by Mr. Howard L. Martin, Esq., of the regional counsel's office of the Alaskan region. And the Respondent was present at all times and represented by Mr. William R. Satterberg, Esq., of Fairbanks.

The parties were afforded a full opportunity to offer evidence, to call, examine and then cross-examine witnesses; in addition, the parties were afforded an opportunity to make argument in support of their respective positions.

DISCUSSION

This matter came on for hearing based on ~~this~~ the order of suspension which alleged that the Respondent held the airman certificate, a certain airman certificate, and he admitted that. The paragraph 2 of the order of suspension states that on or about May 6 of 1998 near Fairbanks,

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Alaska, you operated and acted as pilot-in-command of civil aircraft November-7468-delta, a Piper PA-18, in a flight that terminated in a landing at the Chena marina airport, and that was admitted.

Paragraph 3 states that while attempting to complete your landing roll you lost control of the aircraft and collided with a helicopter situated on the ground, thereby damaging the helicopter, and the Respondent admitted that.

Paragraph 4 states that under the circumstances described above the, operation of the aircraft was careless, endangered the property of another and that has been denied.

And as result of those allegations, the Administrator, as I indicated, is seeking a 30-day suspension of the airman certificate.

The Administrator relied to a certain extent or perhaps a large extent on the Linstam doctrine but did call one witness, Mr. Cebulski, who was sworn in and testified here that he is a 3000-hour flight instructor, that he was on the field at Chena marina airport on the date in question and he was sitting in an aircraft with a student of his, although they hadn't started the aircraft yet and they had, they were doing a preflight and were going to decide, and there was a question whether they were going to proceed to do the air work because of the winds, which he testified

were coming out of the west and rolling over the hills that are immediately to the west of this airport, and the airport does have a principally a north-south runway, runway one-slash-nineteen.

He testified he saw the aircraft after it touched down and it was tipped up on its left wheel and was making a turn to the right and he saw it run into the helicopter. On cross-examine they talked about, and on direct, on redirect, he again talked about the winds, if they were out of the west, would roll off of the hills there immediately to the west of the airport.

The Administrator then rested and the Respondent called himself, or his counsel called Respondent, and Dr. Wheeler testified that although he had four, five hundred hours total time, he only had 20 to 25 hours in a taildragger; that he had listened to ATIS and he got the ATIS advisory about the 12-knot wind out of the west, gusting to 18. He felt like he could make the landing. He touched down, he wasn't sure what happened, he just knew that he lost control of the aircraft and it went into the helicopter. He testified he didn't have any insurance and his total out-of-pocket expense for this accident was about $30,000.

He did testify that there was an emergency action taken against him for failure to take a six-oh -- well, it's

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now a 709 ride, recertification ride, although that sort of evidence has no moment here today, although his counsel argued and the doctor believed that the FAA might have, the Administrator might have, been pushing this particular action because of his failure to surrender his certificate previously on the 609-709 ride.

There were no exhibits admitted into evidence. That was the testimony from both sides.

Two comments. One, in general, I would say this, Dr. Wheeler, your counsel has argued about some retribution, if you will, on the part of the Administrator, and there are cases, I think, that are distinguishable between retribution and those where the Administrator has exercised prosecutorial discretion. As a judge in Oklahoma, we used to get highway patrol tickets and on the back of the ticket, ~~sec~~ the highway patrolman would write attitude of the person that they wrote the ticket. ~~The~~ The Supreme Court did away with that because they felt like that was unfair, but I think the bottom line, though, there as here, is that if the Administrator perceives that you have a certain attitude that might have been displayed about not surrendering your certificate, they have a broad range of prosecutorial discretion, and it's not the Safety Board's job to delve into that, just like it's not a district court's job to look behind the prosecutorial discretion that might be exercised

by a district attorney.

The bottom line here is that they perceived, notwithstanding all these other issues, they perceived a violation, 91.13 violation, they proceeded with it, and it's not the Safety Board's job to look beyond that. Now if there wasn't any evidence at all of that, then I could talk about it more and it might result down the line in a consideration for an award of an attorney fee should you prevail. But in this case, there were several factors, and I'll just relate to them the way I see them.

First of all, you as a pilot knew as you were coming over there that the winds were 12-knot, gusting to 18, from the ATIS broadcast, and this was a taildragger. And there hasn't been any evidence here today, but I'll bet if you got the Piper Cub, Supercub, operation manual out, there's probably that sort of a direct crosswind landing to the south with that wind directly out of the west, would be real close to the maximum allowable, if not exceeding it, and I said there's no evidence of that manual here today.

There was the testimony of Mr. Cebulski about the wind out of the west at that little airport having a rolling effect coming off of the hills which creates another problem. Another factor for consideration today is your fairly low time in a taildragger, and I don't -- I have some instruction in taildragger, I have a good friend who has a

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Cessna 195 and I've flown with him a lot and he, in fact, he's won best of the show at Oshkosh about three years in a row with this 195, he's real proud of it and he should be. But he will not land if the wind is not right down the center line of the runway. He just won't take it out, and if he's out flying cross-country he'll go to another airport or he'll find one that's lined up that way.

And I know that taildraggers are difficult to land under all conditions, and a direct crosswind, 12 gusting to 18, that's just a factor here today.

The other thing is factor is this dirt strip, those buildings, and you can see from the picture over on the wall which is an aerial photograph of that airport, along with the Fairbanks International airport, where we are now holding this hearing, is that there are buildings pretty close to that west side of that runway. There appears to be trees along that west side and those all are going to just compound a direct crosswind to the extent that, although it may be a hindsight thing here today, but it's pretty clear that under those circumstances you probably shouldn't have landed that day.

But I think the Administrator has established by a preponderance of the evidence here today the regulatory violation as alleged, and that is a regulatory violation of FAR 91.13(a), a careless operation, and the sanction sought

of a 30-day suspension will be affirmed.

ORDER

It's therefore ordered that safety in air commerce and safety in air transportation requires an affirmation of the Administrator's order of suspension as issued and specifically I find that a preponderance of the evidence has established the regulatory violation as alleged, and the sanction of a 30-day suspension is affirmed.

WILLIAM R. MULLINS, JUDGE

7/27/99

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MR. SATTERBERG: If I may, Your Honor, we would ask that suspension be retroactive for the period of time that he was suspended for about six months. He actually went into suspended status sometime in November, December, and didn't get his license unsuspended until after he'd taken the check ride.

JUDGE MULLINS: That's -- that will be up to Mr. Martin. I -- the Safety Board doesn't have any control over that, and I would urge the --

MR. MARTIN: I will make a representation we'll discuss it with flight standards. I don't want to make a commitment today, but I'll --

JUDGE MULLINS: Okay.

MR. MARTIN: -- we'll talk about that.

JUDGE MULLINS: Okay, and you do have the right to appeal, Dr. Wheeler, and you may do by filing your notice of appeal within 10 days of this date. If you do elect to appeal within 10 days of this date, then you need to file a brief in support of that appeal within 50 days of this date.

The notice of appeal goes to the Office of Judges, NTSB, in Washington. And the brief goes to the general counsel at the National Transportation Safety Board in Washington, and I have those addresses and the times and everything on this slip of paper and I'm going to hand it to your counsel and I'd like the record to reflect that I've

handed Mr. Satterberg a copy of those rights to appeal.

(Judge proffers document to counsel.)

JUDGE MULLINS: Doctor, or Mr. Satterberg, do you have any questions about the order?

MR. WHEELER: No.

JUDGE MULLINS: Any question or comment?

MR. MARTIN: No.

JUDGE MULLINS: All right. Thank you, gentlemen. We're off the record.

(Whereupon, at 3:01 p.m., the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF SERVICE

This is to certify that a copy of the Oral Initial Decision and Order which was signed and edited on July 27, 1999, by the officiating Judge in this case, was mailed to the appropriate parties and/or their attorneys on this 27th day of July 1999.

ANNE SMITH
Paralegal Spec/Hearings Asst.
Circuit IV, WILLIAM R. MULLINS
Administrative Law Judge
Arlington, Texas

EVAN L. WHEELER
SE-15494

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

JANE F. GARVEY,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

CARLSTON BEAZER,

Respondent.

Docket No.: SE-15014

U.S. District Court
5500 Veterans Drive
3rd Floor Courtroom
St. Thomas, U.S. Virgin Islands

Friday
June 25, 1999

The above-entitled matter came on for hearing pursuant to notice at 11:25 a.m.

BEFORE: WILLIAM A. POPE, II, Administrative Law Judge
National Transportation Safety Board

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APPEARANCES:

On Behalf of the FAA:

RUSSELL B. CHRISTENSEN, Attorney
Southern Region
Office of Regional Counsel
P.O. Box 20636
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On Behalf of the Respondent:

[None Present]

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: JANE F. GARVEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, Complainant, v. CARLSTON BEAZER, Respondent.	Docket No.: SE-15014

ORAL INITIAL DECISION

BY JUDGE WILLIAM A. POPE:

The following is my oral initial decision in the case of the Administrator, Federal Aviation Administration, Complainant, versus Carlston Beazer, Respondent, Docket No. SE-15014:

The Respondent, Carlston Beazer, is a citizen of the Colony of British Virgin Islands. On October 31, 1994, the Respondent and two others were convicted on their plea of guilty in the Magistrates Court of the Territory of the Virgin Islands of possession of a controlled drug, to wit 17 kilos of cocaine, with intent to supply it to another in contravention of the laws of the British Virgin Islands.

Upon his plea of guilty, the Respondent was

sentenced to pay a $60,000 fine by December 15, 1994, or in default of that, to serve three years in prison.

The Administrator charges that the Respondent possessed the cocaine while he was aboard a U.S.-registered civil aircraft, N348CH, owned by another. The Administrator charges that his activity involving possession of the 16 kilos of cocaine -- strike that, 17 kilos of cocaine, with intent to distribute or supply to another violated Title 21, United States Code; Section 959(B)(2), which makes it a felony punishable by imprisonment in excess of one year, for anyone aboard an aircraft owned by a United States citizen or registered in the United States, to possess a controlled substance with intent to distribute.

The Administrator then charges that by reason of the above, he lacks the qualifications to hold an Airman Pilot Certificate, and that Title 49, United States Code, Section 44.710 (B)(2) mandates the revocation of his commercial pilot certificate.

The Respondent contends that he did not violate any laws of the United States because the act was committed on the territory of the British Virgin Islands, and that his possession of cocaine had nothing to do with the U.S.-registered aircraft.

The Administrator, through witness Paula Dozier

from the FAA Civil Aviation Security Division, established that the aircraft bearing N348CH is a U.S.-registered aircraft, and that the aircraft is registered in the registry maintained by the Federal Aviation Administration.

Sergeant Samuel McSheene, a member of the Royal Virgin Islands Police Force, testified that he was on duty on September 3, 1994, at the police station on Virgin Gorda, one of the islands of the British Virgin Islands, and that the police station is located one-quarter to one-half mile from the international airport.

At about 10:00 a.m., he received a telephone call from an immigration officer indicating that Carlston Beazer had just landed an aircraft on the airport. Inasmuch as Mr. Beazer was suspected of being a person involved in drug activity, Sergeant McSheene immediately got into his vehicle with another police officer and went to the vicinity of the aircraft and surveilled what was going on.

He arrived within two minutes after the telephone call. There was only one aircraft on the airport, and that was the aircraft bearing the registration N348CH. He observed the Respondent, Mr. Beazer, and two other individuals walking away from the aircraft. One of the individuals named Solomon was

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carrying a cardboard box.

The three individuals left the airport building, got into a vehicle and travelled to the ferry dock a short distance away. Sergeant McSheene followed the vehicle and observed the man named Solomon get out of the vehicle and get onto the ferry with the cardboard box.

Sergeant McSheene reported that over the radio, and at the ferry's destination, Solomon was arrested by other Virgin Islands police officers, and the box was found to contain 17 kilos of cocaine.

The Respondent admitted to Sergeant McSheene that he had been the pilot of the aircraft involved here, and that on that day he had travelled from St. Kitts to St. Maarten to Anguilla, and then to the airport in Virgin Gorda.

Subsequently, the Respondent, with Sergeant McSheene in the aircraft also, flew the aircraft, using the keys that he had in his possession, to an impounding place maintained by the Virgin Islands Police Department where the aircraft was impounded.

As was noted, Sergeant McSheene testified that subsequently the Respondent was charged with possession with intent to distribute the 17 kilos of cocaine and was fined $60,000. The Sergeant also testified that the Respondent was convicted of importation. However, that is

not reflected in the court record, so I will disregard that.

As there is ample evidence that the Respondent flew the aircraft into Virgin Gorda and was seen in the immediate vicinity of the aircraft in company with another man who had the cocaine in his possession, I think a reasonable inference could be drawn that the cocaine came in on the aircraft that was piloted by Mr. Beazer, and I so find.

49 USC; Section 44.710 (B)(2) provides that the Administrator shall issue an order revoking an airman's certificate if the information knowingly carried out an activity punishable under a law of the United States or a state relating to a controlled substance, except simple possession, where that offense is punishable by death or imprisonment for more than one year if an aircraft was used to carry out or facilitate the activity and the individual served as an airman or was on the aircraft in connection with the carrying out or facilitating of the activity.

21 USC; Section 959 (B) prohibits possession, manufacture, or distribution by a person onboard an aircraft owned by a U.S. citizen or registered in the United States of a controlled substance, which cocaine most certainly is.

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Section C of the Act specifically provides that it is intended to reach acts of manufacture or distribution outside the territorial jurisdiction of the United States. Violations of 21 USC; Section 959 (B)(2) are punishable under 21 USC; Section 841 (A)(1) which provides, in the case of the quantity of cocaine involved here, for imprisonment for not less than 10 years, or more than life.

Thus, 49 USC; Section 44.710 (B)(2) requires the Administrator to revoke the certificate of any airman who either served in that capacity or was onboard an aircraft in connection with carrying out or facilitating a drug activity, other than simple possession, punishable under law of the United States.

21 USC; Section 959 (B) and (C) make it a violation of the laws of the United States for a person onboard an aircraft owned by a U.S. citizen or registered in the United States to possess a controlled substance with intent to distribute, even though the Act occurred outside the territorial jurisdiction of the United States.

In this evidence -- in this case, the evidence conclusively established that the Respondent was onboard a U.S.-registered aircraft in the territory of the U.S. Virgin Islands, and that he also transported onboard that aircraft 17 kilos of cocaine with the intent to

distribute.

His drug activity falls squarely within the scope of 21 USC 959 (B) and (C). Thus, his misconduct is punishable under the laws of the United States as defined in 49 USC; 44.710 (B)(2), and the Administrator is required to revoke any and all airman certificates issued to him.

The Board has consistently held that even when an aircraft is not used, the holder of an airman's certificate who participates in commercial drug activity demonstrates that he lacks the degree of care and judgement and responsibility required to hold an airman's certificate, and that revocation is the proper sanction. See Administrator v. Piro, NTSB Order EA 404.9; 1993.

That notwithstanding, under 49 USC; 44.710 (B)(2), the Administrator is required to revoke any airman's certificate held by an individual who engaged in the carrying out or facilitating the carrying out of a drug activity, in this case, possession of a controlled substance with intent to distribute, in which an aircraft was used.

On consideration of all the substantial, reliable, and probative evidence of record, I find the Administrator has proven by a preponderance of the evidence that Respondent violated 49 USC; Section 44.710

(B)(2) and 21 USC; Section 959 (B) and (C), and that his criminal drug activity demonstrates that he lacks the degree of care, judgement, and responsibility required to hold an airman's certificate, and that the Administrator is required to revoke any and all airman pilot certificate issued to him, including Commercial Pilot Certificate No. 00244595.

ORDER

Accordingly, it is hereby ordered: (1) The Administrator order is affirmed; (2) Any and all airman certificates held by the Respondent, including his Commercial Pilot Certificate 00244595, shall be and is revoked.

The Respondent is not here today, and I have already found that his absence is unexcused, so I have no way of delivering to him the written summary of the appeal process, his appeal rights. Therefore, I will simply read them into the record at this time.

APPEAL

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it has been served. An original and three copies of the notice of appeal must be filed with the:

National Transportation Safety Board

Office of Administrative Law Judges

Room 5531

490 L'Enfant Plaza East, S.W.

Washington, D.C. 20594

Telephone: (202) 314-6150 or (800) 854-8758.

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and three copies of the brief must be filed directly with the:

National Transportation Safety Board

Office of General Counsel

Room 6401

490 L'Enfant Plaza East, S.W.

Washington, D.C. 20594

Telephone: (202) 314-6080.

The Board may dismiss appeals on its motion or the motion of the other party, when a party who has filed the notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by the other party within 30 days after that party was served with the appeal brief. An original and three copies of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

Note: Copies of the notice of appeal and briefs

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must also be served on the other party.

An original and three copies of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of the General Counsel in Room 6401. Copies of such documents must also be served on the other party.

The Board directs your attention to Rules 43, 47, and 48 of its Rules of Practice in Air Safety Proceedings, codified in 49 CFR; Sections 821.43, 821.47, and 821.48, for further information regarding appeals.

Absent a showing of good cause, the Board will not accept late appeals or appeal briefs.

[End of Oral Initial Decision.]

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JUDGE POPE: At this time, I will ask the reporter to mark a copy of the written summary of the appellate rights as ALJ Exhibit No. 1, and include it with the record.

[ALJ Exhibit No. 1 was marked for identification.]

JUDGE POPE: Mr. Christensen, if you will come forward, I will give you a summary of the appeal rights also.

Is there anything further from the Administrator in connection with this case?

MR. CHRISTENSEN: No, Your Honor.

JUDGE POPE: Very well. Then the record is closed and the hearing is terminated.

[Whereupon, at 12:32, the hearing was adjourned.]

CERTIFICATION

This is to certify that the attached proceedings

BEFORE: NATIONAL TRANSPORTATION SAFETY BOARD

HELD: June 25, 1999

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were held as herein appears and that this is the official transcript thereof for the file of the Department or Commission.

Deborah Tallman, Court Reporter

Edited August 2, 1999
William F. Fahey, II
Judge

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CERTIFICATION

I [illegible] to certify that the attached proceedings

before: NATIONAL TRANSPORTATION SAFETY BOARD

on: June 25, 1999

were held as herein appears and that this is the official transcript thereof for the file of the Department or Commission.

D. Tallman

Deborah Tallman, Court Reporter